165-373

165-373

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 577.

DENNIS DAVIS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED AUGUST 10, 1896.

(16356.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 577.

DENNIS DAVIS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	a	1
Indictment	1	1
Order granting new trial in obedience to mandate of Supreme Court of the United States	3	2
Order for continuance	3	2
Order beginning trial	3	2
Order concluding trial	4	2
Verdict	5	3
Judgment and sentence	5	3
Order allowing bill of exceptions	6	4
Order allowing writ of error, etc., at public expense	6	4
Order granting stay	6	4
Bill of exceptions	7	4
Statement of evidence for the Government	7	4
Testimony of Dennis Davis before the commissioner	8	5
Statement of evidence for the defendant	11	7
Testimony of John Corliss	12	8
Nelson Coaker	12	8
Wm. Ainsley	12	8
Richard Gardenhire	12	8
Geo. Hill	12	8

	Original.	Print.
Bill of exceptions—Continued.		
Statement of evidence for the defendant—Continued.		
Testimony of Dr. J. C. Amis	13	8
Dr. T. J. Wright	15	10
Statement of evidence for the Government	17	11
Testimony of —— Eoff	17	11
Charge to the jury	19	12
Instructions asked by defendant	53	33
Exceptions to charge	59	36
Verdict	63	39
Judge's certificate to bill of exceptions	63	39
Assignment of errors	64	39
Affidavit of poverty	89	55
Petition for writ of error	90	55
Writ of error	91	56
Citation	92	56
Acceptance of service of citation	92½	56
Clerk's certificate	93	57

a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of

UNITED STATES
vs.
DENNIS DAVIS. } Indictment for murder. No. 95.

1 *Indictment.*

United States of America, western district of Arkansas, in the circuit court, Aug. term, A. D. 1894.

UNITED STATES
vs.
DENNIS DAVIS. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Dennis Davis, a negro and not an Indian, on the 18th day of Sept., A. D. 1894, at the Creek Nation in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Sol Blackwell, a negro and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that the said Dennis Davis with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Dennis Davis, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said Sol Blackwell, and that the said Dennis Davis with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Dennis Davis discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound him, the said Sol Blackwell, in and upon the head and body of him, the said Sol Blackwell, giving to him, the said Sol Blackwell, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Dennis Davis, in and upon the head and the body of him, the said Sol Blackwell, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Sol Blackwell, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Dennis Davis him, the said Sol Blackwell, in the manner
2 and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 95. United States vs. Dennis Davis. Murder. A true bill. S. A. Williams, foreman. Witnesses: A. H. Brewer, Texanna, I. T.; John Thomas, Eufaula, I. T.; Ben Scales, Eufaula, I. T.; Dick Shaver, Eufaula, I. T.; Jas. Brizzolara, Ft. Smith, Ark.; S. H. Brown, Eufaula, I. T.; John Thompson, Eufaula, I. T. Filed in open court Oct. 13, 1894. S. Wheeler, clerk. By I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, Nov. term, 1896, Tuesday morning, 8½ o'clock, Jan. 28, 1896.

UNITED STATES
vs.
DENNIS DAVIS. } Indictment for murder. No. 95.

In obedience to the mandate of the Supreme Court of the United States, dated January 24, 1896, it is hereby ordered by the court that the verdict of the jury in this cause, returned Nov. 17, 1894, and the judgment and sentence of this court, Feb'y 2, 1895, be, and the same are hereby set aside and held for naught, and that this cause be docketed and the defendant granted a new trial.

FEB. TERM, 1896, *Saturday, Mch. 7, 1896.*

(Caption omitted.)

Ordered by the court that this cause be and the same is hereby continued to the next term of this court and set down for trial May 29th, 1896.

MAY TERM, 1896, *Wednesday, June 10, 1896.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Oglesby, Ben Cravens, and Emil Meyer, and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court, more than

4 two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined. Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right to challenge under the law, the following were selected for the trial of this cause, to wit: Albert Callison, Archibald Griffin, Geo. W. Jefferson, John H. Larrimore, sr., Thomas Mayes, Wm. W. Stevens, Marion T. Mitchell, John A. Roberts, Carey F. Speller, Willis M. Tyler, Wm. Tollison, Jas. M. Thomas, twelve good and qualified electors of the western district of

Arkansas, duly selected, empaneled, and sworn to try the issues joined and a true verdict render according to the law and the evidence; and after hearing the evidence and the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

THURSDAY, *June 11, 1896.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal, and by his attorneys, Messrs. Oglesby, Ben Cravens, and Emil Myer; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Albert Callison, Archibald Griffin, Geo. W. Jefferson, John H. Larrimore, sr., Thomas Mayes, Wm. W. Stevens, Marion T. Mitchell, John A. Roberts, Carey F. Speller, Willis M. Tyler, Wm. Tollison, Jas. M. Thomas, who took their seats in the jury box and received the charge of the court, to which said charge counsel for the defendant filed exceptions. Whereupon said jury retired, in charge of the sworn bailiff aforesaid, to consider of their verdict, and after some time returned into court the following verdict, to wit:

"We, the jury, find the defendant, Dennis Davis, guilty of murder as charged in the within indictment.

(Signed) "THOMAS MAYES, *Foreman.*"

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant was remanded to the custody of the marshal to await final sentence.

FRIDAY, *June 12, 1896.*

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Dennis Davis, was brought to the bar of the court, in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 11th day of June, A. D. 1896, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said. Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Dennis Davis be deemed, taken, and adjudged guilty of the crime of murder, for wilfully and of his malice aforethought killing Sol Blackwell in the Indian country; and it is ordered by the court that the said marshal of the district aforesaid cause the said Dennis Davis to be taken hence, and him, the said Dennis Davis, safely and securely keep from the date hereof until Thursday, the 30th day of July, A. D. 1896, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day the said marshal cause the said Dennis Davis to be taken to some convenient place within this district,

to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon,
on Thursday the said 30th day of July, in the year of our Lord
6 one thousand eight hundred and ninety-six, cause the said Dennis Davis to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

SATURDAY, *July 25.*

(Caption omitted.)

Comes the defendant, by his attorneys, Messrs. Oglesby and Myer, and tenders his bill of exceptions, asking that the same be filed, signed, and made a part of the record in this case, which is accordingly done.

And the said defendant having filed an affidavit setting forth that he is an indigent person and wholly unable to pay the expense of an appeal, it is hereby ordered that the clerk of this court issue the writ of error and citation, file all necessary papers, enter all necessary orders, and make the necessary transcript for the Supreme Court in this cause at the expense of the United States.

Now comes defendant and files his assignment of errors, and at the same time files a petition for a writ of error to the Supreme Court.

SATURDAY, *July 25.*

(Caption omitted.)

Now comes the clerk and makes known to the court that a writ of error taking this case to the Supreme Court of the United States has been issued.

It is therefore ordered that execution of sentence be stayed pending action of said Supreme Court.

7 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas. May term, 1896.

UNITED STATES *vs.* DENNIS DAVIS. } Murder.

Be it remembered, that upon the trial of the above-stated cause at the regular May term, 1896, of said above-named court, the following proceedings were had:

After the jury were duly empaneled and sworn according to law, the Government introduced witnesses by whom was established the following state of facts: That the defendant is a negro, and not a citizen of the Creek Nation, nor of the Indian Territory; that he killed Sol Blackwell, who was not a citizen of the Creek Nation, or of the Indian Territory,

on the 18th day of September, 1894, under the following circumstances; that the offense was committed in the Creek Nation, Indian Territory:

The deceased and the defendant, about a week before the killing, had a misunderstanding in regard to the making of the sugar cane crop which the defendant was making for deceased on land rented from deceased—the defendant refusing to make up the one-half of the cane belonging to deceased; that about a week after this misunderstanding the defendant took a gun and slipped up to near where the deceased was at work picking cotton, shot the deceased and killed him while the deceased was at work, and while unarmed and when not doing anything towards harming defendant, and that thereupon the defendant ran away from the place where the shot was fired, went immediately to the nearest town, Eufaula, and there surrendered himself to the officers, telling the officers that he had killed Blackwell and detailing how he had killed him, as above set out.

8 The testimony upon the part of the Government further established that the defendant made no effort to conceal the fact that he had killed deceased, and that he insisted upon surrendering himself to the officers, who carried him to Ft. Smith before Commissioner Brizzolara, to have a committing trial; that the defendant stated to a Government witness, Johnson, who had him in custody, that he had killed the deceased; that the deceased had made threats against him and that he had gone over to where deceased was picking cotton and shot him; that after making this statement he asked the witness "how he reckoned his case would go."

The testimony further established that when brought before the U. S. commissioner the defendant stated to the commissioner that he wanted to plead guilty to the charge against him. He insisted on pleading guilty prior to entering into an examination of the case. The commissioner would not permit him to do so, but informed the defendant that he had the right to make a statement if he desired to do so, but if he made one it could be used against him, and advised the defendant not to make any, but the defendant insisted upon making the statement, was duly sworn as a witness in his own behalf, and testified as follows:

Mr. BRIZZOLARA. Now, Mr. Davis, just go ahead and tell what you have got to say about it.

Mr. DAVIS. Last Thursday evening I was down in the cane patch cutting cane to make molasses—it was in the morning. I was wrong about that. He come and rode down there where I was cutting cane. He says: "You are making it up, are you?" "You leave the rows standing up," he says. "Yes, sir," I says. "There was no statement made on the ground," I says, "in cutting it up I will cut your share on the ground." He says: "If you don't make that cane up I will give you a load of buckshot; look out, and depend upon it I am going to do it. I have got enough to keep my wife, and I will give you a load of buckshot and will go and live in the Mississippi bottom all my days."

Mr. BRIZZOLARA. When was that?

9 A. Last Thursday morning a week ago. Then he went off. I thought he had gone to get a gun. I went on grinding out and in just about one hour's time he was back there. And he says again, "If you don't make up that cane you will wish you was never born." That was all that he said that day. He came back Saturday, him and another

man; I didn't know him and they both had guns. I was coming from town with a sack of flour. As I got in sight I saw him and supposed he was waiting for me to come there. I decided I would go through the field about 75 yards from the house I was living in. He turned around and rode back about 20 steps of the house, and he says, "Davis, come out here." I told him, "No, I don't want to." He says, "Come on out here." I says, "I will never do it." He was standing about 20 steps from the corner of the house. He jerked up his gun like he was going to shoot me. I run around and run in the house. He says, "Look out, I will get you yet, damn you."

Mr. BRIZZOLARA. Who was at the house?

A. There was nobody there but my wife and children, that is all.

Mr. BRIZZOLARA. Is that all?

A. Yes, sir; that is all.

Cross-examination by Mr. BRIZZOLARA:

Q. State about the shooting of this man.

A. I was going down to strip cane that morning, about two loads of mine, in the field; I saw him down there and went and got a gun and shot him.

Q. What was he doing when you shot him?

A. Picking cotton.

Q. Did he have his back towards you?

A. I could not tell. There was some bushes between me and him, and I could not tell you.

Q. You didn't say a word to him?

A. No, sir.

Q. How many times did you shoot him?

A. Only once.

Q. What kind of a gun did you have?

A. A needle gun.

Q. Where did you shoot him at?

A. I could not tell you. I didn't go to him.

Q. At the time you shot him, was he trying to shoot you?

A. No, sir.

Q. You say it was on Thursday a week that he came to your house?

A. Yes, sir.

Q. Who was with him?

A. Nobody.

Q. Who was with you?

A. A man to dress up and a boy.

Q. Did he come on horseback or afoot?

A. He came on horseback.

Q. What kind of a gun did he have?

A. He did not have any gun.

Q. Did he have any arms at all?

A. No, sir; not that I know of.

Q. What is the two boys' names, or man and boy, that was there?

A. Will Elsey and Claude Calles.

Q. What time in the day was it?

A. About 10 o'clock.

Q. How long did he stay there?
A. About 20 minutes.
Q. Where did he go?
A. He rode right away. And when he rode away I went down to the mill where they grind cane.
Q. Did you see him any more after that?
A. Yes, sir; he come to the mill where I was grinding cane.
Q. Who was there?
A. There was a woman there.
Q. Who was it?
A. Haley Willey's wife.
Q. No one else there but you two?
A. No, sir.
Q. When did you see him again after this?
A. Not until Saturday morning.
Q. Who was with him?
A. I don't know the man that was there with him.
Q. Was he a white man or a black man?
A. He was a black man. I understood it was his brother-in-law, and I guess it was him.
Q. You understood it was his brother-in-law?
A. Yes, sir.
Q. Did they have any arms?
A. Yes, sir.
Q. Where were they at?
A. About 75 yards from my house. They saw me acoming, and I turned and went through the field.
Q. This was on the place that you were living on now, was it?
A. Yes, sir.
Q. When did you shoot him?
A. Tuesday last.
11 Q. That would be Tuesday, September, 189 ?
A. Yes, sir; I believe that was the day.
Q. From Saturday morning up to the time you shot him you did not see him, did you?
A. Yes, sir; I saw him around my hen-house along that morning that I shot him. I don't know what he wanted.
Q. That was about what time in the day?
A. About 8 or 9 o'clock in the morning.
Q. Who was with him?
A. He was by himself.
Q. Did you make any kind of a statement to anyone else in regard to this thing?
A. Yes, sir; I told it to a man that was called Thompson, I believe was his name.

The evidence further established that the deceased was found dead in his cotton patch, where deceased said he shot him, with a cotton sack around his neck, and with a bunch of cotton in his hand, unarmed and shot through the body.

That after killing deceased, defendant met some parties upon the road and told them he had killed deceased and supposed he (deft.) would have to go to jail for it.

The evidence upon the part of defendant established and tended to establish the following facts:

That the deceased a few days before the killing threatened defendant's life, told him he would kill him and then go to the Mississippi bottom where he could never be found; that two days before deceased was killed he went to defendant's house with a gun, made threats against his life, and attempted to get the defendant to come out of his house, which he declined to do. These threats grew out of a misunderstanding in regard to making up sugar cane which defendant was making on deceased's land.

The defendant's testimony further established and tended to establish the following state of facts, by witnesses who had known him
12 intimately from five to fifteen years, and who had been with him repeatedly, and who had had occasion to observe his acts and conduct; that at times he would talk sensibly, then suddenly quit talking upon the subject of conversation and begin to talk foolishly about other subjects; that he would talk incoherently and disconnectedly; that in the midst of conversation he would suddenly commence laughing when nothing had occurred to provoke laughter, and laugh incessantly for minutes at a time; that he had a queer, peculiar look out of his eyes; that he would sit and stare with a vacant, meaningless stare for hours at a time, with his eyes fixed and under jaw hanging down, and he would at times when engaged in conversation get up and hurriedly leave parties with whom he was talking without any explanation; that he would at times quit work and suddenly start off, and when called back would say that he did not know where he was going or what he was doing, and would ask, "What was I doing, and where had I started?"

That John Corliss, a lay witness introduced by the defendant, when asked as to his opinion of defendant's mind, said: "He didn't have a good mind."

Nelson Coaker, a lay witness introduced upon the part of the defendant, when asked as to his opinion as to the condition of the mind of the defendant, said: "He is not a man of sound judgment. My opinion is he is not of sound mind."

William Ainsley, a lay witness offered for the defendant, when asked as to the condition of mind of the defendant, said: "I don't think he has got real good sense. To my opinion he don't act that way."

Richard Gardenhire, a lay witness introduced for the defendant, when asked as to his opinion of the defendant's mind, said: "I don't think he has got a sound mind."

George Hill, a lay witness introduced by defendant, when asked as to his opinion of the condition of the defendant's mind, said: "I wouldn't call him, in my judgment, a man of good, sound judgment; no, sir."

The COURT. How is that?

13 "The WITNESS. In my understanding I would not call him a man of good judgment.

"Mr. MYER (of counsel for defendant). Would you say, or in your opinion would you believe, he was a man who was crazy or not crazy?

"The WITNESS. No, sir; I could not say that he was crazy.

"Q. Do you believe that he is a man that is responsible or irresponsible for his acts?

"The COURT. That is a matter that the witness can not pass upon, Mr. Myer.

"Mr. MYER (of counsel for defendant). Does the court hold the question inadmissible?

"The COURT. Do you think he is sitting here to determine that question? He can not pass upon that. He can pass upon the question of his sanity or insanity. He says he could not say as for that; he is not able to answer as to that.

"The WITNESS. No, sir; I am not able to answer that."

J. C. AMIS, a physician, was introduced by the defendant, who testified that he had been engaged in the practice of medicine for fourteen years, a graduate of the Medical University of Louisville, Ky., and had given the subject of mental diseases study; that the study of mental diseases was a part of his education as a physician; that he knew the defendant, Dennis Davis, and treated hom for a month or two while he was confined in the jail at Ft. Smith after the commission of the homicide. The witness described the appearance, acts, and conduct of the said defendant, said that he would sit down on his spittoon and gaze down on the floor as if looking at some object, when none was there, manifesting no interest in anything that was going on; that although violently ill he was indifferent and unconcerned during his illness, was never worried about his condition, never saw any change in his expression, but he would sit and gaze in a dreamy, melancholy way, with his mouth open and under jaw hanging down, having a vacant, meaningless stare, his face expressionless—just a blank; that from witness' observation and knowledge of defendant he believed him to be of unsound mind and that he did not know right from wrong in any particular concrete case; would
14 perhaps in the abstract know right from wrong, but in a particular act, in his opinion, he would not. The witness was then asked the following question: "What does medical science say as to that meaningless, vacant stare, and the lower jaw hanging down in a listless way? What does medical science teach as to that?" Which question was objected to, and the court sustained the objection and refused to permit the witness to answer the question; to which action of the court the defendant at the time excepted.

Witness further stated that if it was true that the defendant at times talked sensibly, and during such conversation would suddenly break off and talk incoherently upon a wholly different subject, and if it was true that other times while engaged in conversation would suddenly break out in laughter and laugh immoderately and incessantly about nothing; and assuming it to be true that at other times he would talk volubly but foolishly, that he would at other times sit and stare vacantly for an hour or two at nothing, with under jaw hanging down, his face expressionless; and if true that at other times while engaged in conversation he would suddenly jump up, pick up his hat, and suddenly leave, and that if at other times while at work would suddenly start away, and attention called to it would return, saying, "I don't know where I was going or what I was doing;" and assuming it to be true that the deceased had threatened to kill the defendant and cautioned him to be on the lookout, and that defendant had said he would be on the watch, and that the deceased

after making these threats came to the defendant's house with a gun; that on account of the fear that defendant had of deceased he would not come out of his house; that afterwards the deceased was at work near defendant's house and that defendant then went out and got a gun, went to where the deceased was picking cotton, and shot him while he was picking cotton, then went immediately to the officers and surrendered himself, told what he had done, and when afterwards brought before the commissioner for trial insisted upon pleading guilty to murder, and insisted upon detailing, and did detail, before the commissioner all that had
15 transpired, then, in witness' opinion, assuming above facts to be true, the defendant was of unsound mind, and as to the act charged against him was not of sufficient mental intellect to distinguish right from wrong.

Upon cross-examination the witness stated that if it be true that after shooting the deceased the defendant saw another man in the distance, and broke and ran through the brush, got his horse and started to where the officers were to deliver himself up, met parties in the road, told them he had killed a man and supposed he was going to jail, that that state of facts would indicate that he had some knowledge that he had violated the law, and would indicate that he knew he had done wrong.

He further stated that in metaphysics motive prompts action, and that if in this case the defendant had a motive for killing the deceased that would indicate that he acted from motive in the killing.

On redirect examination counsel for defendant asked the witness the following question: "You were asked in regard to motive; I will ask you if medical jurisprudence does not teach, and if you have not learned from medical jurisprudence, that insane people, people who are insane, do have a motive for the acts they commit, and act upon motive?" to which question the district attorney objected, the court sustained the objection and refused to permit witness to answer question, to which action of the court the defendant excepted. Witness was also asked by defendant's counsel the following question: "Is it not true that people of unsound mind, or insane people, are very frequently cunning in the commission of acts; if your reading has not taught you to know that?" to which question the dist. atty. objected, the objection was sustained and the court refused to permit witness to answer the question, to which action of the court the defendant at the time excepted.

Dr. T. J. WRIGHT, a witness introduced on behalf of defendant, after having qualified himself as an expert witness to testify upon insanity, testified that as jail physician at the U. S. jail at Ft. Smith, he had occasion to observe and watch the conduct, action, and demeanor of defendant.

16 Witness then described the acts, conduct, and expression of defendant, and his testimony as to this was the same as that of the preceding witness, J. C. Amis. The witness then stated that in his opinion the defendant was of unsound mind, and that he did not have sufficient mental capacity to distinguish right from wrong as to the particular act charged against him, and that in his opinion because of mental weakness the defendant did not have such power of inhibition as to abstain from the wrong and adhere to the right. The same hypothetical ques-

tions propounded to the witness J. C. Amis, as herein above set out, was propounded to this witness, who stated that assuming the facts to be true, as stated in the hypothetical questions, then in his opinion the defendant, at the time of the commission of the act, was of such unsound mind as not to know right from wrong as to the act, and that he did not have sufficient will power, by reason of mental weakness, to abstain from doing the act if he did know it was wrong. Witness on cross-examination stated that he had never had occasion to test the strength of the defendant's will power, never saw any matter that put to the test the strength of his will power, that he did not know whether defendant regarded it right or wrong to kill a man, and that he did not believe after defendant killed the man and surrendered himself that he (defendant) regarded himself as morally guilty; that he believed he looked upon himself simply as technically guilty, and that he would have to go through all the routine of being imprisoned and tried and probably punished, but he did not think the defendant had any sense of moral guilt in the matter; he could not discover any in conversation with him.

Witness was then asked by district attorney the following question: "You think from your experience with him, from your conversation with him, that he killed the man because he threatened his life; your idea is that he killed the man because he threatened his life?" to which question the defendant at the time objected, the objection was overruled, and the witness permitted to answer the question, to which action of the court the defendant then and there at the time excepted, because the said question was incompetent and irrelevant and sought to
17 elicit testimony that was not competent. The witness then answered: "Well, in part; and because he thought his own life was in danger, and because he thought he had the right to destroy this menace to his own life."

Which answer was by the defendant objected to as incompetent and irrelevant; objection overruled, and defendant at the time excepted.

Defendant rests.

The Government introduced as a witness, Eoff, whose name was not on the list of witnesses served upon defendant. The defendant objected to the examination of the said Eoff as a witness upon the part of the Government because no notice had been served upon either the defendant or his attorneys that the said Eoff would be used as a witness, nor was his name upon the back of the indictment as a witness for the Government. The dist. atty. announced he only expected to use the witness as a witness in rebuttal, and thereupon the court overruled the objection of defendant and permitted the witness to testify, to which action of the court the defendant at the time excepted. The witness, after first stating that he knew the defendant and had talked with him while confined in the jail at Ft. Smith during the time some men by the name of Shelley were confined in the jail, was asked the following question by the dist. atty.: "Did the defendant ever come to you with any propositions from the (*the* Shelleys), to which question the defendant objected because the same was incompetent and irrelevant and sought to elicit incompetent and irrelevant testimony that was not in rebuttal. Objection was overruled and witness permitted to answer the question, to which action of the court in overruling the objection defendant at the

time excepted. Witness then stated there was a man named Shelley in the U. S. jail at that time and his wife was in the hospital adjoining; that she was accused of putting a pistol there last summer when one of the guards was shot and killed; that during the time Shelley was in there the defendant carried notes at the request of Shelley to his wife in the hospital; that the defendant came to witness and asked him about
18 it, stating that he would not do it without witness' consent, and witness said, "Go ahead and do it." The defendant carried perhaps a dozen letter to Shelley's wife. He would give these letters to him (witness), witness would give them back to defendant, and he would carry them to her. He was playing a friend to the Shelleys and at the same time thought he would give some aid to witness or to the officers in finding out how the pistol got in the jail with which the killing was done. The defendant objected to the witness' answer, and moved to exclude the same because it was incompetent and irrelevant and because the same was not in rebuttal of any testimony offered by the defendant, which objection was by the court overruled; motion to exclude the testimony overruled and the testimony admitted, to which action of the court the defendant then and there at the time excepted.

This was all the testimony offered in the case.

The court thereupon charged the jury as follows:

19 *Charge of the court.*

Gentlemen, the defendant is before you, charged with the crime of murder for having on the 18th day of September, 1894, willfully and with his malice aforethought taken the life of Sol Blackwell, a negro and not an Indian, by shooting him with a gun. The allegation is made also that Dennis Davis is a negro and not an Indian. The uncontroverted proof shows that Blackwell may have been a citizen of the Creek country, but that Dennis Davis, the defendant, is not a citizen of that country, but a citizen of the United States. That would give this court jurisdiction.

That is the nature of the charge in this case. We take up these charges and give you in detail what is necessary to be found in order to ascertain the existence of the crime charged. We do it in detail because in that way you can the better understand the nature of the charge and what requisites must be established in order to make out the crime. The first thing you are called upon to do is to find whether Sol Blackwell is dead, and you must say whether that fact is established beyond a reasonable doubt, and, secondly, whether he died by violence of the kind named in the indictment—that is, he was killed by being shot to
20 death with a gun. You look to the evidence to see whether that fact is established beyond a reasonable doubt. The next thing you are required to ascertain is whether the defendant did the act which resulted in his death. That is the third proposition you are called upon to ascertain from the testimony in the case. Then you are to find what was the character of that killing—that is to say, you are called upon to characterise it and say whether it was a crime or not. The Government alleges it was murder. The defendant denies it was murder as affecting him because, he says (or his counsel for him say), he did not have mind enough to commit the crime of murder, and there could not exist in the

act as done by him the elements which show willful/ness and malice aforethought. Now, these things are to be passed upon by you, and, of course, if you pass upon the different elements of the crime and find it was done willfully and with malice aforethought by the defendant, and you find the defendant at that time had a responsible mind, you will find that he is guity of murder, because the existence of elements of that kind characterise the killing as murder.

It becomes necessary in this connection to tell you what elements enter into the crime of murder. If this defendant is sane, and the proof shows he killed Sol Blackwell by shooting him to death with a gun, there being nothing in the case which would excuse such act of killing under the law, or that would reduce the grade of the crime (and that is a fact which is impliedly admitted by counsel upon the part of the defense in their argument), when you find a case of that kind, where a man has been shot to death, where the facts as claimed by the Government here show a lying in wait, show previous preparation, show the selection of a deadly weapon, show concealment to get an opportunity to do the act—where that state of case exists, if there is a mental condition of the kind that renders a man accountable, there is crime, and that crime
21 is murder, under the law. You will bear in mind, in passing upon the question as to whether there is crime or not, whether there was deliberation, whether there was continuity between the different acts committed, whether there was that premeditation which would show a mind capable of forming a design, that all these things I have enumerated are to be taken into consideration by you as evidentiary facts to enable you to characterise this killing.

DEFINITION OF THE TERM "WILLFUL."

It is necessary that I should define to you these different elements of the crime. It must be shown that the deed was done by the defendant as charged, that he intended to shoot Sol Blackwell with a gun, and that that was done willfully—that is, intentionally, because the word "willful," as used in this connection, means "intentional," and not "accidental." It means, in other words, that you are to take the act as done, and by means of that act you are to find out how it was done, because although the law requires you to find the mental condition of the man who is charged with committing the act, it does not expect of you impossibilities. It affords you a reasonable method of finding that mental condition. That mental condition can not be found except by the circumstances surrounding the transaction, or that led up to it, that were connected with it, that preceded it, and the circumstances which followed it, because there is no power on earth able to get into the human mind and determine what is going on there. You must determine that by the acts done. Then you naturally ask, how are you to find it. You must judge of a man's purpose and of his thoughts by what he does. Suppose you see a man with your own eyes pointing a gun at another, and suppose, for example, you see a man discover another in a field at work, picking cotton, and after he discovers him you would see him go
22 off and get a Winchester or other gun; he comes back and you see him wait to get an opportunity to get a favorable shot at the man; from that fact and from these numerous acts you are to ascertain what

you would conclude as reasonable men. You are to determine whether from these acts as done by the defendant you would say that the act of shooting was willful upon his part, and not only that, but whether or not these acts have a connected purpose, whether they were systematic, whether they all tended towards the same result—that is, they tended towards the developed purpose of killing the man who, in this case, was in his own field at work. You are to ascertain what you would conclude from a condition of that kind if you had witnessed it, what sort of an impression would be left upon your minds, or a well-founded conviction, a conviction of so certain a character that it could be defined as one beyond reasonable doubt. Of course, whatever you would conclude from such facts, ascertained by your own observation, you have a right to conclude, and it is your duty to conclude, in the jury box, when such facts are reproduced before you by means of the testimony. And it is for you to say what are the facts, because although the court has a right to give its opinion of the evidence if it sees proper to do so, and not only that but to tell you what each fact proves and what each fact is worth, still the right and the duty to pass upon the weight of the evidence and of its proving power is solely with you. You are the sole judges of its weight. The court may aid you by giving its opinion upon these propositions, if it sees proper to do so. It never stops to tell you what each fact proves, or what its opinion of each fact is, though many courts do that. It enumerates the facts you are to take into consideration in the case, either on one side or the other, leaving to you the sole duty of ascertaining the proving power of those facts. Now, I say, if that state of case
23 is reproduced before you by the evidence you have a right to take that evidence and determine from it what is the condition of this case. It is the only way you can find the condition of his mind with reference to the act done by him. If these facts and circumstances are upon a parallel with the acts of a man of sane mind when he kills, when he prepares to do it, when he selects a deadly weapon and lies in wait for his victim to get a favorable opportunity, all these facts and these circumstances may be taken into consideration by you to show willfulness, to show intent upon his part; and these facts and circumstances, I say, may be considered by you for that purpose. If you find that he committed all these acts, and if they are proven before you beyond reasonable doubt, and you take into consideration further the fact that he had sufficient will power to be regarded as sane, under the law, then from these facts you would be authorized to find that the act of killing was willful on the part of the accused, because you take into consideration, as you do ordinarily, naturally, and reasonably, the facts presented in the shape of the character of the gun, in the shape of where he got that gun, in the shape of what he did with it after he did get it—that is to say, that he presented it upon Sol Blackwell when the opportunity, in his judgment, was presented to make the act done by him effective, and that he pulled the trigger—these are all propositions, each and every one of them, that you have a right to take as proven when you have a state of case showing that a man did present a gun at another and kill him by firing it upon him, because a gun is inanimate; it can not act of itself; there must be some action upon it; there must be some power which sets the deadly missile in motion; and you then take into consideration these very

things to enable you to see if the act as done by him was willful. If you have found a case before you that is shown by the evidence
24 to that degree of certainty that it is proven beyond a reasonable doubt, as to the proposition that the gun was presented by the defendant and fired upon Sol Blackwell, that would show willful/ness.

Let me read to you briefly from a case which shows what you may take into consideration to enable you to say that the act as done was willful:

"A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion is that he intended so to destroy such person's life."

It is a natural conclusion from the act done. If he points a gun at another within shooting distance, and fires upon that other, and the party fired upon is killed, the law authorizes you to say in such a case that he intended to kill him. The law says it is an intentional act.

In another case one of the present members of the Supreme Court of the United States (Mr. Justice Field) in charging the jury upon the subject of "malice aforethought," in the case of United States v. Outerbridge, said:

"Malice is implied in every case of intentional homicide."

And, of course, if malice is implied, it is also implied that the act was done willfully, because to make malice aforethought there must exist a state of willful/ness.

"That is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused the death. If there are any circumstances of excuse or palliation which will rebut the implication of malice, it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the usual consequences of his acts. A man can not strike another violently with a bar of iron without inflicting bodily pain. If, therefore, he does thus strike another, the law presumes that he intended thus to inflict pain."

Now, another proposition:

"The usual effect of a leaden ball, fired from a loaded pistol of
25 the common size, at a distance of a few feet, when striking the head or back of a person, is to kill such person. The law therefore presumes that everyone who thus fires a loaded pistol within a few feet of the objects intends to kill. It therefore implies malice in him."

I have now told you what is meant by intent and willful, and when you have that condition shown by the testimony which shows that the defendant presented a gun at the party killed, while in the cotton field at work, and fired it at him, and you find that the party had a mind that was sane, under the definition of that condition as I will give it to you presently, you would have the doing of an intentional act, and, consequently, the doing of a willful act. The connection between an act of that character and the result called death is so usual, it is so probable, and it is so natural, and it so often occurs, that the law says that when you find he intentionally did the act he intentionally produced that death, and, therefore, willfully produced it. This is the first element of the

crime of murder. It is not the distinguishing characteristic, however, because willful/ness may exist in a case of manslaughter, but in a case where there are no mitigating facts, where there are no reasons to justify the killing under the law, when you have the doing of a wrongful act willfully done by a party who was sane, when you have it done intentionally, you have also existing in connection with it the other great characteristic of the crime known as malice aforethought. That is to say, where a man in a sane condition of mind shoots another and kills him, and there is nothing in that killing under the circumstances or facts that tend to justify it, or to reduce the grade of it from the higher crime known as murder to the one of lesser grade known as manslaughter, you have a condition that is recognized by the law as the doing of a wrongful act, an illegal act, in such a way as to show the absence of mitigating facts which would justify or which would reduce the grade of it,
26 and that is one of the definitions of malice aforethought.

DEFINITION OF THE PHRASE "MALICE AFORETHOUGHT."

What is meant by malice aforethought? Let us take in this connection the definition given in a case which has been recently approved by the Supreme Court upon the subject of insanity, the case of United States v. Guiteau, tried for the murder of President Garfield. In defining malice to the jury the court in that case said:

"It must be further shown that the death was caused with malice aforethought. This does not mean that the Government must prove any special illwill, hatred, or grudge on the part of the prisoner towards the deceased. Whenever a homicide is shown to have been committed without lawful authority and with deliberate intent, it is sufficiently proved to have been done with malice aforethought. And this evidence is not answered and malice is not disproved by showing that the accused had no personal illwill against the deceased, but killed him from some other motive."

Now, here is the definition of malice aforethought: "Whenever it is shown to have been committed without lawful authority, and with deliberate intent, it is sufficiently proved to have been done with malice aforethought."

You will inquire, in this connection, whether there is any evidence offered here showing that this defendant had lawful authority to kill the deceased. Then, on the other hand, whether there is any evidence showing deliberate intent to kill upon the part of the defendant. In passing upon that proposition it is your duty to take into consideration every circumstance as going to characterise the act. While you are not required, in order to show the existence of malice aforethought, to find that there was any special spite entertained by the defendant against Sol Blackwell, or any peculiar hatred, or any condition of illwill entertained by the defendant against Blackwell, yet if that condition appears, if the proof shows there was, no matter that the cause for that would be entirely inadequate for such a condition, no matter that the motive in
27 the shape of illwill or hatred or spite or grudge would be entirely inadequate to the act of killing of Sol Blackwell, you are never to find motive which is proportionate, you are not required to find its existence at all, because you may find the existence of malice aforethought

without it, as this eminent court which tried Guiteau told the jury, if the proof shows that the killing was done unlawfully, and done with deliberate intent as evidenced by the way it was done, and the preparation for it, the selection of the weapon with which it was done, and the going to the place to do it, the seeking of the favorable opportunity to do it, if these things, in your judgment, show deliberate intent, and there is nothing in the case which gives the defendant the right to kill, and he is of sane mind, as I will define that condition to you presently, then you must find that he is guilty of the crime of murder, because there is a condition attached to the killing known as the one which characterises the crime of murder.

That is one definition of that element known as malice aforethought which enters into this crime and which distinguishes it. It means the doing of a wrongful act. When we come to acts of this kind which result in death, and where we have the doing of a wrongful act when there is no just cause or excuse, or in the absence of anything that would mitigate the crime—that is to say, that the party had no ground to kill in self-defense, or when the crime could not be reduced in grade because of its characteristics—in the absence of these two conditions, when the evidence shows the seeking of an opportunity, the preparation of deadly means, if it does show that (and as to whether it shows it or not you are to pass upon); and, thirdly, if it shows a lying in wait in order that he might be where the deadly missile could be sent more effectively
28 through the body of the victim—I say, when you find this, and there is a mental condition known as sanity, you have malice aforethought, because you have the doing of a wrongful act without just cause or excuse or in the absence of mitigating facts, which produces death. Therefore, the law lays it down that when you have a willful killing or an intentional killing, by a sane person, where you have a killing which shows the means that were used to produce that result, which shows systematic selection and preparation of a deadly agency in the shape of a gun, selection of a location to hide in ambush, and all these attendant circumstances of the act, you have a right to take into consideration such circumstances to show deliberation, you have a right to take them into consideration to show premeditation, and you have a right to take them into consideration to show that the act was thought of beforehand in order to enable you to say whether there was malice aforethought characterising the killing and therefore making it murder, because under such circumstances it would be the taking of a human life without just cause or excuse or in the absence of mitigating facts.

Again, the law says if a man, for some fancied or real wrong which does not justify the act under the law, takes a human life in such a way as to show a heart void of social duty and a mind fatally bent upon mischief, that that has attending it malice aforethought, because each of us while occupying a position in society occupy a relative position. We do not stand alone, we do not live by ourselves with no duties resting upon us towards others. We have great rights belonging to us, but everybody else has the same rights, and because of the existence of these great rights, which are mutual, there rests upon us duties equally as great, which are mutual—duties towards our fellow-men. Any and every man, for example, has the right to his life as the most precious and dearest

right which belongs to him until he forfeits that right under the
29 law for his crime, and when another man wickedly, wantonly, without just cause or excuse, or in the absence of mitigating circumstances, takes his life he is forgetting the high social duty which rests upon him not to destroy but to protect it, to protect innocent human life, to protect unoffending life, to protect life which is entitled under the law to be protected. When he forgets that high social duty and wantonly, wickedly, and without just cause or in the absence of mitigating facts takes such a life, he is then responsible to the extent of being guilty of murder. When he does an act which is characterised by previous preparation, when he does an act characterised by lying in wait, when he does an act characterised by seeking ambush where he can safely and securely do the deadly deed, when it is an act of that character you then take into consideration these accompanying acts in the shape of his conduct to enable you to characterise the act and say what it is. When you have an act done in that way by a sane person you have an act which is accompanied with malice aforethought, because involved in malice aforethought is premeditation, is deliberation, and the fact of previous preparation shows premeditation; it shows deliberation. If a man seeks an occasion to do a thing, that is evidence that he thought of doing that thing before he executes the thought. All these circumstances are pertinent and relevant to this issue and are to be taken into consideration by you to enable you to characterise the act. That would be a state of case where the act as done would show a heart void of social duty and a mind fatally bent upon mischief, and that is one definition of malice aforethought.

In the case of Com. v. York, a prominent case in this country, the court said:

"Malice aforethought in its legal meaning means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act done inten-
30 tionally. If I am arraigned of a felony and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. This is sometimes called malice in law in contradistinction to malice in fact, because the law draws the inference from the fact. The court charged the jury in the case of Wills against Noyes, 12 Pickering: 'Legal malice might differ from malice in the acceptation of the term that to do a wrongful act, knowing it to be such, constituted legal malice.' That was confirmed by the whole court, and so that whatever is done with a willful disregard of the rights of others, whether it be to compass some unlawful end or some lawful end by unlawful means, constitutes legal malice.

"In a more recent case of the Commonwealth v. Snelling, the court, after noticing the legal and popular meaning of the term 'malice,' says:

"'In a legal sense any act done willfully and purposely to the prejudice and injury of another which is unlawful is, as against that person, malicious.'"

These instances, taken from cases having no analogy to the crime of homicide, are adduced to show that the presumption of malice from a

wrongful act, an injurious act, willfully done, when applied to homicide, is not technical, or artificial, or invented for the particular occasion, but is the result of a mode of legal reasoning which is of general application. The same doctrine is laid down as the undoubted law of England in a recent work of good authority, frequently republished and in extensive use in this country (2 Stark. Ev., 963), in which the writer states the general doctrine I have been stating, "malicious" imports nothing more than the wicked and perverse disposition with which the party commits the act; and he illustrates the general proposition by a reference to this presumption of malice in the case of homicide. His words are:

"The application of the term 'malicious' is strongly illustrated in the case of homicide where the malus animus, which brings the offence within the denomination of willful murder, is frequently to be collected by the court as a matter of law from the circumstances of the case and is not an inference of fact to be drawn by a jury, as it must necessarily be whenever the malice consists in the specific intention actually existing in the mind of the agent at the time of the act."

Now, then, I say to you if you have these circumstances as attending this killing in the shape of previous preparation, in the selection of deadly means, in the selection of an opportunity, in the hiding
31 of the party who executes the purpose, if you find the existence of these things as attending this killing, and you find that the defendant was sane, they are circumstances you are to take into consideration to show premeditation, to show that he thought of the fact long before, to show that he considered the purpose beforehand, to show that he contemplated the purpose, and not only that, but you go behind these acts to see what were the relations between he and Blackwell, bearing in mind that the evidence of threats which has gone before you as having been made by Blackwell would not give the defendant the right to take Blackwell's life, nor would it give him the right to ask that the act be mitigated or reduced in grade, because you can not kill a man because of threats. You have no right to take his life because of threats made. Threats can not be weighed in one side of the balance against human life in the other side. That would be out of all proportion. If there was a law which provided a man should be tried for making a threat, and you were called upon to pass upon his case, and you would find him guilty and the court would take upon itself the responsibility of sentencing him to death for such threat, you would be shocked, and the whole civilized world would be shocked at such a judgment of a court, because these acts as done by the individual are to be only in proportion to the acts done by the party who kills. But you may take into consideration the threats made by Blackwell to him for the purpose of showing the relation of the parties, and then you may take that as an initial point, as a starting point, and you may follow up his conduct and see what it was, and see whether it was connected and systematic and there was continuity about it in the shape, first, of preparation by getting the gun, and then of going to the place, and then of seeking the opportunity, and then of taking
32 the life of Blackwell. These things are especially relevant in this case to enable you to find, first, whether there was malice aforethought, and then to find what the condition of the mind of the party was, whether or not that condition shadows forth one that evidences

the existence of a mind acting from malice, acting from a spirit of vengeance, acting from special spite, special hatred, special ill will, special animosity, or whether they were so disconnected or of a character that would show insanity. These things are all relevant. They must all be taken into consideration. When a man forms a wicked design, the execution of which will produce death, and he executes that design, if he is a sane being, if he has what the law calls a sane mind, not that he may be partially insane, not that he may be eccentric, not that he may not be able to control his will power if he is in a passion or rage because of some real or imaginary grievance he may have received, and you find these other things attending the act, you would have a right to find the existence of the attributes of the crime of murder known as willfullness and malice aforethought.

I have undertaken to define to you this condition which is named by the law as malice aforethought. I have told you it implies premeditation and thought of beforehand, not for any specific length of time, not for a year, a day, or an hour, because the purpose to kill may be formulated in the mind instantly with the act of killing, or more correctly speaking, cotemporaneous with it, and it may be there and then executed. If it is an act done unlawfully, without just cause, or in the absence of mitigating facts, it would be an act that had malice aforethought in it as much so as though it had been contemplated for years or days or hours. If you have a case where the purpose to kill is manifested by preparation to kill, by the selection of a deadly weapon for the purpose of killing when the party had no right to kill, when you have these circumstances you may take them into consideration to more satis-
33 factorily and more clearly to show the elements of deliberation and premeditation or that the act was thought of beforehand.

THE DEFENSE OF INSANITY AND ITS MEANING IN LAW.

It is claimed by the defendant he was incompetent to commit crime at the time of the commission of this act. That raises an issue in the case, and it becomes necessary that I should give you the law bearing upon that issue. Neither you nor I can say what the law is; we follow its mandates on this subject as well as upon all others, and when we do that correctly we are apt to arrive at a safe conclusion. Jurors are to find a verdict which is in harmony with the truth, as it should be.

It may be safely asserted that there are three things which enter into this crime—three elements—first, the killing, and it was done willfully and with malice aforethought, and that it was done while the defendant had a responsible mind. These are the three propositions which enter into it. Now, it may be asserted as a correct proposition that the burden of proving all of these propositions is upon the part of the Government. The Government is relieved on the start of produ' any evidence to show that he was sane because there takes the pl' evidence that which is recognized by the law as a presumption, and generally called a legal presumption, which is that all parties are sane. It is like the presumption that all parties are innocent of crime. Therefore, while the burden is upon the Government to prove all these conditions, I say, it is relieved of proving the one as to sanity by this presumption which is

one founded upon public policy—that is, that the defendant, like all other men, is sane, or was sane at the time. I now read to you again from the charge of the court in the celebrated Guiteau case:

34 "In the next place, I instruct you that every defendant is presumed innocent until the accusation against him is established by proof.

"In the next place, notwithstanding this presumption of innocence, it is equally true that a defendant is presumed to be sane and have been so at the time when the crime charged against him was committed; that is to say, the Government is not bound, as a part of its proofs, to show affirmatively that the defendant was sane. As insanity is the exception, and most men are sane, the law presumes the latter condition of everybody until some reason is shown to believe the contrary. The burden is therefore on the defendant, who sets up insanity as an excuse for crime, to bring forward his proofs, in the first instance, to show that that presumption is a mistake as far as it relates to him.

"The crime, then, involves three elements, viz, the killing, malice, and a responsible mind in the murderer."

Here is the doctrine of the law as it is at the present interpreted, going to show you how far, to what degree of certainty, this proposition must be carried.

"But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned—i. e., that the defendant is innocent till he is proved guilty, and that he is and was sane, unless evidence to the contrary appears—and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground (either as to the killing or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal."

In this very case that doctrine was approved. The Supreme Court says that "the principle is correctly stated by Mr. Justice Cox, of the supreme court of the District of Columbia, as follows:

"The crime, then, involves three elements, viz, the killing, malice, and a responsible mind in the murderer. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned—i. e., that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears—and considering the whole evidence in the case, still entertain what is called a reasonable doubt on any ground (either as to the killing or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal."

That is an express affirmance of the doctrine as laid down in that case.

We now proceed to define to you what insanity is. We have told you to what extent it must be proven. Let us see what the nature of
35 this defense is. Let us see what insanity is, and how far it must go before a man is excused when he has taken human life because of insanity, to what extent mental aberration must exist before it can be claimed for a party that he is not to be held responsible.

The defendant interposes this plea of insanity, and he says by this plea in effect that he did the killing, but the act is not one for which he can be held responsible. In other words, that the act was and is excused in the law because he was insane at the time of its commission. We want to know now what is meant by being actually insane. That is what you want to know. You do not want to make any mistake about it. You do not want to make any mistake against the Government or against its people, because if it is found that he was insane and we would convict him, that would be a mistake, and it would be a mistake if he is not insane, and for the purpose of covering up this killing and escaping the consequences we would acquit him on a feigned plea of insanity, for that would be an imposition and a fraud, and it would cheat justice and be an outrage upon the people. First, then, we must know exactly and precisely what is meant in law by his being insane. I will undertake or endeavor to tell you, and I bespeak your most earnest attention upon this proposition of insanity.

The term "insanity" as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control. This condition of insanity is one which must exist at the time of the commission of ~~the act,~~ and it must go to the extent defined as a condition of insanity sufficient to excuse for an act that would
36 otherwise be a crime to enable you to sustain it as an excuse. It would be an excuse if that was the condition, no matter how brutal or atrocious the killing may have been. For a person to be excused from criminal responsibility it is not necessary that he be a raving maniac, but ordinarily it requires something more than mere eccentricity of a natural character. Such insanity does not excuse. A person may be afflicted with partial insanity and yet be wholly responsible to the criminal laws of his country for his criminal act. The law does not excuse in such cases unless the derangement is so great that it actually renders the person incapable of distinguishing between right and wrong.

It may be well in this connection to inquire what is meant by knowing the right from the wrong with reference to the particular act charged against the defendant. The law assumes the existence of the power of consciousness for persons of ordinary intelligence or capacity to distinguish between right and wrong with reference to particular acts. If the defendant was incapable of knowing the right from the wrong with reference to the particular act charged against him, or unconscious, at the time, of the nature of the act, or if he was deprived of his will power to such an extent as to render him, at the time, unable to control his passions, he would be excusable. And when I say deprived of his will power, I mean not that he has voluntarily thrown it off and abandoned himself to his passions or his whims, and it is not a state of case where a man has been deprived of his will to some extent. Whenever a man, from passion,

from deliberate malice, for a pretended or real grievance, for a real or imaginary wrong; takes a human life, he throws off that power, that part of him known as his governing power or will power, he destroys its
37 domination, he destroys it purposely, and his passions, his malice, his dark and infamous malignity assumes its place and rules the man. This is not a case where he was deprived of his will power so he can say he is insane. There is no such thing as crime if that is the law, because no man who takes a human life in such a way as to make it murder takes it where his will power, given him by the All-wise Being for his self-government, is not overturned, is not dethroned, is not for the time being paralyzed; but that is not insanity. He purposely sanctions this ruling passion of his; he purposely destroys his will power that he may enter upon his bloody mission. I mean, then, not that he has voluntarily thrown off this will power because the man killed may have threatened his life, and he thinks for that reason he could take his life. If threats had been made, if that part of the story is true, and he killed him by reason of these threats, by reason of threats made at different times, if the evidence shows that, at the time of the killing, when he came back that the man he killed was engaged in picking cotton, had the cotton sacks swung to him, and even the bunch of cotton in his hand when his soul, by the hand of the defendant, was ushered into eternity; if you find that state of case, then you have a state of case where you would have a right to consider that there was in it evidence of deliberation, and you would have a right to take it into consideration, these things existing before the killing, as reasons to show why he threw of his will power, that he did that voluntarily, that he threw that will power off voluntarily in order that he might take vengeance upon the object of that vengeance, for that would be a state of case over which he had control, where he was called upon by the law to control himself.

As I have already told you, the law presumes that every person who has arrived at the years of discretion is of sound mind, and that presumption continues until the contrary is shown by all the evidence
38 in the case.

Although you may believe and find from the evidence that the defendant did do the act charged against him, yet if you further find at the time he did so he was in such insane condition of mind that he did not and could not understand and comprehend the nature of the act, or that thus knowing and understanding it he was so far deprived of his will, not by his own passion conceived for the purpose of spurring him on to do the violence, not by his own passion of mind engendered by some real or fancied grievance, but that he was so far deprived of his will by disease or other cause over which he had no control as to render him unable to control his actions, then such killing would not be a malicious killing, and it would be a case where he would have a right to have his plea maintained—the plea of insanity.

You are to bear in mind that you are not to find a man insane because of the wickedness or brutality of the act. If you were to find every man insane for that reason, the very worst crimes would go unpunished, and you would only be called upon to find the man sane who committed murder in a decent and gentlemanly way, like gentlemen when they go out and shoot at each other in duels, or something of that kind. If he

would get his gun and find his enemy in the field working, and lie in wait for him, if these are attributes of insanity the very worst crimes would go unpunished. A man in a fight might be technically guilty of murder in a contest to some extent provoked by his adversary, yet if the circumstances were such that the law would not excuse or mitigate it he would be the one upon whose head the blow would fall, and the man of deliberate purpose, the man of preconceived design, the man of wicked motive, the man who because he had been threatened would deliberately prepare himself with a deadly agency and seek an opportunity to kill his enemy would be insane because the crime is atrocious and
39 brutal. That is not the law. Now, we are to see whether the actions of the man were upon a parallel with a man of sane mind, not that you are to see that the actions of the man who kills deliberately and intentionally are on a parallel with the actions of the man of honest heart and of pure mind, because when a man conceives murder he departs from the world of honesty and of purity and uprightness and integrity. He then lives in another planet. He lives in a murderer's home. He lives in the home of the man of malice, of malignant design. He lives in the home of the man of wicked purpose. His actions from the conception of that purpose are entirely different from the actions of the man whose mind is incapable of conceiving a murderous design. The human heart was not created as the habitation of a design to murder—to destroy human life. And when it becomes such, when that design becomes an inhabitant of the heart, it perverts the mind and destroys the judgment and overturns the reasoning power. So that the actions of the murderer, so that the conduct of the man who willfully and with malice aforethought slays his fellow man, is entirely different from the conduct of the man who is not a man of crime. Therefore, in looking for the existence of insanity, you are first to take the presumption which the law recognizes that the defendant comes into court as a sane man, and in connection with that all the other facts and circumstances such as to show, when all the evidence has gone before you, beyond a reasonable doubt that he is sane.

Now, I have already told you that it is not necessary to find motive for a crime to enable you to say that it is murder, and especially is it not necessary to find adequate motive; and it may be appropriate in this connection, in treating of the subject of insanity, to give you a little further the law upon that subject. Where could you find an adequate motive
40 for a murder? You are reasonable men, you are pure-minded men, you are men who love your fellows and recognize the Golden Rule. Men with minds of that kind and hearts of that nature, in looking for the motive of a deliberate and wicked murder, would most likely overlook it because of its insignificance, according to their judgment, for by the judgment of such men nothing in life is adequate as a motive for such a killing—a killing that would be a wicked and deliberate murder. No motive is adequate. You can find none. The act, in the judgment of honest men, may be perfectly motiveless. The motive may be so inadequate or inconsiderable, as I have said, that they would overlook it. Now, if any man would reason deliberately and fairly before committing a murder, he would not do it. It is a fact that every man who thus takes human life has, to some extent, a perverted mind; he has a heart so per-

verted that he can not conceive his own interest, even. He forgets his duty to his fellow-man. But the interest of society and the protection of the lives of its members will not permit us to regard every man of that kind as an insane man and who is to go scot-free or go unpunished.

I wish to say a word specially upon the subject of motiveless acts. It may be of some benefit to you in this connection. Mr. Wharton upon this subject says:

"It is sometimes argued, Is it likely that one man would kill another for so small an article? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle that the homicide was the result of sudden passion rather than lucri causa?

"Or for a mere prejudice or spite is it likely that one man would kill another and thus expose himself to the gallows? No doubt when a tender mother kills a child, or a friend kills a friend, and nothing more than the fact of the killing is proved, we may be led to infer misadventure or insanity from the motivelessness of the act. But we have no right to make such inference, because the motive is disproportionate. We are all of us apt to act on very inadequate motives, and the history of crime shows that murders are generally committed from motives comparatively trivial. A man unaccustomed to control his passions and unregulated by religious or moral sense exaggerates an affront or nourishes a suspicion until he determines that only the blood of the supposed offender can relieve the pang. So also for the smallest plunder murders have been deliberately executed.

41 "It is often said that a trivial motive is not a motive that could explain a lying in wait and previous preparation to do an act so cruel and with chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. The criminal does not reason as he should. He is incapable of it. He draws false conclusions, and his logic is faulty all the way through. If it was not, he would not commit crime; and the fact that his logic is faulty, that his reasoning powers are not of that character which enables him to take a correct view of the situation, does not establish his insanity. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty all crime is a blunder, as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of mere trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs."

Now, here is the secret of this condition called murder when it exists:

"When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraints."

It does not show insanity, either, because a man acting in a state of passion brought into existence by some real or imaginary grevance upon his part, and he kills because of that condition, and the killing is done in such a way as to show systematic preparation for the act, systematic seeking of an opportunity, an opportunity in the execution of his purpose to take advantage of his victim. The law recognizes that you are to take

into consideration the fact that a man prepares himself beforehand with a deadly agency to use it illegally, not in his own self-defense, and that also when he conceals himself or lies in wait to kill his enemy. These are facts, as I have already told you, which are to be taken into consideration by you when passing upon the question as to whether there was malice aforethought here, or whether or not there was an insane condition.

Now, there is such a condition recognized by the law as that a man may act under an insane delusion and be regarded as insane. It is
42 necessary that you should remember with care what this proposition is. It is necessary that the doctrine of the law upon this subject should be given with great care in order that we may know what is meant by it. You would naturally inquire, What is meant by an insane delusion? If a man thinks he can kill—thinks he has the right to kill—and shoots another down, is that an insane delusion? Not at all. That is not the proposition. If a man has a conception that somebody at the time of the killing, that the man whom he kills, is then and there at that time attempting his life when such is not the fact, there is no foundation for it, and he kills under that delusion, that is evidence of mental derangemant of such a character that it may be taken as insanity. But if the man had made threats against him, and he was acting upon the idea that he could kill because of the threats he has made, he has made a mistake as to the law, and it is not an insane delusion. That is not an insane delusion. That is a misconception of a legal right, and it is not evidence of insanity. He may not have been correct in his judgments as to his rights, but the law presumes that he knows the law, and he does, because every man does who is under the legal presumption of sanity until that presumption is overthrown. That, then, is not what is meant by an insane delusion—that is, that he can kill another man when he feels like it and then come up here and say: It is true, but I was deluded; I was mistaken; I didn't have the right to, but I thought I did.

Listen to the answer made by the House of Lords in answer to a question addressed to them a good many years ago:

"Nearly forty years ago one MacNaughten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the House of Lords addressed certain questions to the judges of the superior
43 courts of England in regard to the law of insanity in certain cases, and their answers have since been regarded as settling the law on this subject in England, and with some qualifications have been approved in the courts of this country. One of the questions was: 'If a person, under an insane delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed in revenge for such supposed injury, he would be liable to punishment.'"

Now, that is very plainly stated, and that shows exactly what an insane delusion is. A man acts under an honest belief, as far as he can

so act under a belief of that kind, that somebody is then and there taking his life; that somebody is in the act of doing it, in such a condition that he would have a right to defend himself if the condition was real, and he acts under that delusion. That is such an insane delusion as to exempt him from responsibility. But if another has made threats, or if another has not done anything, and he kills him because he conceives he could do it, there is no insane delusion about that which would exempt him from punishment. If under the influence of his delusion he supposes another man to be in the act of taking his life, and he kills the man as he would kill in self-defense, he would then act under an insane delusion. Where there was no foundation for that; where he kills him because of threats made, then there is not that state of case which would lead you to believe that at the time of the killing he was under the delusion that the man killed—in this case the man Sol Blackwell—was in the act of taking his life, and that must exist to create a case which may be known as a case where he acts under an insane delusion, and he must kill upon that ground. To establish that, then, it must be shown
44 that the cause of the killing was a conclusion in his mind that at the time he slew him (that is, in this case, when the man killed was picking cotton in the field) that Sol Blackwell was in the act of killing him when such was not the fact, that then there would be an insane delusion. But if he killed Sol Blackwell while Blackwell was at work, because of threats made that had been made, you may take that condition into consideration as evidence of deliberation, as evidence of design, as evidence showing previous preparation, as evidence showing, under the circumstances of this case, lying in wait, showing the doing of an act systematically and with continuity of purpose, and it does not show that the defendant acted under the insane delusion that Blackwell was at the time trying to take his life.

Reading from the case of Com. v. Rogers, where Chief Justice Shaw recognizes the doctrine:

"Monomania may be offered as an excuse for a criminal act when the delusion is such that the person under its influence has a real and firm belief of some fact not true in itself, but which, if it were true, would excuse the act"—

That is it. A man acts under an honest belief, so far as he can entertain such a belief, that another is then and there taking his life, or attempting to take it, in such a way that, if that was true, it would be necessary to defend himself by killing that other, and he kills; that is an insane delusion—

"Where the person under its influence has a real and firm belief;" for example, that at the time the defendant in this case shot Blackwell that Blackwell was in the act of killing him; that it was not true in itself, "but which, if it were true, would excuse the act; as when the belief is that the party killed (that is, Blackwell, in this case) had an immediate design upon his life, and under that belief the insane man kills in supposed self-defense."

If he killed because of threats, then there would not be anything to
45 show that Blackwell at the time of the killing had an immediate design upon his life, or that he was in the act of doing anything of that kind. It would not show, in other words, that the killing was caused by the conception in the mind of the defendant that

Blackwell was then and there in the act of taking his life when such was not the fact.

"A common instance is where he fully believes that the act he has to do is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supercedes all human laws and the laws of nature.

"But the insane delusion," said Mr. Justice Cox in charging the jury in the Guiteau Case, "according to all the testimony, seems to be an unreasonable and incorrigible belief in facts which are either impossible absolutely, or at least impossible under the circumstances of the individual. A man with no reason for it believes that another is attempting his life, or that he himself is the owner of untold wealth, or that he has invented something that will revolutionize the world, or that he is God or Christ, or that he is dead, or that he is immortal, or that he has a glass arm, or that he is pursued by enemies, or that he is inspired by God to do something."

If he acts under these insane delusions, and there is nothing upon which they can be based, and he acts in good faith, operating under a delusion of that kind, it will excuse him, but it must be of that character.

In this case, I repeat, it must have been a state of case where the defendant acted under the belief at the time he killed Blackwell that Blackwell was in the act of killing him, in the act of perpetrating upon him an act of deadly violence, or that he might do him some great bodily harm, then and there, and that he could not reasonably avoid such consequences, or escape from such condition; that would be an insane delusion which would excuse.

Evidence has been offered to you for the purpose of showing that condition of mind which would excuse the defendant for the killing of Sol Blackwell. That evidence is of two kinds; that is, the evidence of experts who give you their opinions upon what is called a hypothetical case, and it is sufficient to say in this connection, as to that sort of evi-

46

dence, that it is simply the opinion of the man who gives it that goes to you as expert testimony. You are not to stop with that opinion and take it as conclusive, but you are to go behind it and to give it proving power as you may believe it is sustained by the reasons given by the expert, depending upon the opportunity he had for observation. If he gives to you his deductions as a medical man, then you are to take those statements as matters of opinion, and you are to go behind them and see what opportunities he had for making the observation, for founding a conviction, for coming to a conclusion; to see if at the time the observations were made whether the condition of the party was real or feigned. These are facts which are to be taken into account. And then you are to look to these things to see to what extent they prove the condition of mind of the party—that is to say, whether they prove that state of insanity that I have defined which excuses, or whether they simply prove a condition of feeble mind which would not excuse if he was still capable of knowing the right from the wrong with reference to the particular act, and to judge of the character of that act.

That is one class of witnesses that have been offered before you. Another class give their opinions. They are sometimes called, in the law, lay witnesses. They are citizens. They give their opinions as to

the condition of mind of this party. You are not to take that opinion with an inquiry as to the reasons which sustain it, to see whether these reasons are such as show mere eccentricity of character, mere peculiarity of mind in the defendant, or whether they show that mental condition which would excuse him from crime; that condition as I have defined it to you as one of insanity.

You are to take into consideration all the circumstances, take into consideration his ability to earn a livelihood, and the fact of his earning a livelihood and raising a family. All these things are to be taken
47 into account. Then, in passing upon the testimony of these lay witnesses, in passing upon their opinions, you are to see to what extent they go, whether they pronounce him insane themselves, or whether they simply say he was not a man of good judgment, or that he was eccentric or peculiar, or whatever the facts may be. You are to get at the foundation of the opinion given by all witnesses, and the reasons given for these opinions. You are to see, with reference to these physicians, what opportunity they had for making an investigation; whether they were comparatively limited, or whether they were personally acquainted with this man for a long time, and whether or not his peculiar condition spoken of by Dr. Wright was one which might be produced by physical debility, by sickness of body.

It is for you to take the standard of the law which defines insanity, and by that standard you are to weigh this case. These statements made by lay witnesses when they give you their opinions as to his mental condition are merely matters of opinion—witnesses who may have known the man—common people. They are all competent to give opinions upon matters of this kind from their association with the party, from their observation of his conduct through the period they may have known him. You take the opinions of these men who come in here and say they know the defendant and undertake to give you opinions, and see how they are sustained by reasons offered by them. A bald, naked opinion, given by a party as to the mental condition of another, not sustained by sufficient reasons to give it weight as a proving fact, would not have that power that an opinion would which was sustained by competent reasons.

THREATS MADE BY DECEASED.

In this connection it is necessary to tell you what figure threats cut in a case. It is declared that:

"Courts of justice everywhere agree that neither the bad character of the deceased"—

48 But that is not proven in this case. There is no evidence upon the question of the bad character of the deceased, Sol Blackwell—

"nor any threats that he may have made, forfeits his right to life until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

Now, these threats, of course, made by Blackwell were called out and were offered by the district attorney upon the part of the Government.

They can not be taken into consideration to reduce the grade of this crime or to justify it. They may be taken into consideration, having been made to the defendant, to show the relations which existed between these parties, to enable you to see whether or not this defendant acted from deliberation, from premeditation, from a condition of special spite, special hatred, or ill-will against Blackwell, or whether he acted in a condition and under such circumstances as to indicate that his mind was to that extent insane, that he was unconscious of the nature of the act that he did, or was incapable of knowing the right from the wrong with reference to that particular act.

You are to inquire, in this case, first, whether there was a killing, and then whether the act of killing was done by the defendant, and what was his condition of mind, under the law, as I have given it to you, at that time; see what his mental condition was at that time, under the law; and, secondly, as to whether he is to be held responsible for the act or not. Then, besides, you are to see whether or not these attributes of the crime of murder that I have given you exist in this case.

THE MEANING OF "PROOF BEYOND REASONABLE DOUBT."

The law says that all the facts in the case which go to make guilt as I have enumerated them—that is to say, the condition of mind
49 where the party, under the law, is capable of committing crime, the fact of the killing as described in the indictment, and the fact that it was done willfully and with malice aforethought, must be proven beyond a reasonable doubt. It is necessary, then, that I should define to you what is meant by proving these propositions to that extent or in that way.

It is sometimes believed by persons that there is great mystery about this idea that a proposition must be proven beyond reasonable doubt, and you occasionally almost see the minds of men try to stretch into the future to see if there is a mystic and impossible condition that they can attain where a proposition is proven in that way. There is nothing of that kind attending it. This proposition here is to be solved like any of the real and important propositions in life. When they are proven to that degree of certainty that they satisfy the minds of twelve reasonable men to such an extent that they believe in the conclusion so certainly that they would act upon that belief as citizens in a matter of great importance affecting another, then it is established, it is proven beyond a reasonable doubt, and there is guilt in a case of that kind.

Let me read to you, briefly, upon this subject. Here is an instruction which was given by the court below and sustained by the Supreme Court of the United States defining what is meant by proof beyond reasonable doubt:

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so and in that case find him not guilty. You are further instructed that you can not find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

"The court further charges you that a reasonable doubt is a doubt based on reason and which is reasonable in view of all the evi-
50 dence. And if, after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you would have no reasonable doubt."

The Supreme Court, in passing upon that instruction, said:

"The word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs. Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused in the majority of criminal cases must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities."

It was said that an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt had often been held sufficient without further explanation. In many cases it may undoubtedly sufficient.

"It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But in many cases, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact, it has been the general practice in this country of courts holding criminal trials, to give such explanation or illustration. The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them, but an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion, when an attempted definition might fail. If the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. The instruction in the case before us is as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence they should do so, and in that case find him not guilty. The evidence must satisfy the judgment of the

51 jurors as to the guilt of the defendant so as to exclude any other reasonable conclusion.

"The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock in Rex v. Miller. 'I have heard,' said the Chief Baron, addressing the jury, 'the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: "It is not necessary that you should have a certainty, which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life. No doubt the question before you to-day, involving as it does the life of the prisoner at the bar, must be deemed to be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect." ' "

That is what is necessary to make out a state of case where it is proven beyond reasonable doubt.

CONCLUSION.

Now, in conclusion, I will say to you that I call your attention to the elements which enter into this crime and the conditions which must exist in order to enable you to say whether there is crime here or not. It involves three elements—the killing, malice, and responsibility of mind in the murder. Now, after all the evidence is in, bearing in mind the fact that the defendant starts into the case with the presumption of innocence in his favor, and also the presumption that he is sane in his favor—I say after all the evidence is in, after you bear these presumptions I have named in mind—that is, that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears—considering the whole evidence in the case, you still entertain what is called a reasonable doubt, as I have defined it, on any ground, either as to the killing or the responsible condition of mind, whether he is guilty of the crime of murder as it has been explained and defined, then it would be your duty to acquit the defendant if that is the state of case.

52 But if not carried beyond that, as I have defined proof beyond reasonable doubt, or if it is carried to the point where you are able to say as twelve reasonable men that all the propositions and essentials which enter into this crime have been so established that there is no longer confronting the conclusion a doubt for which a good reason can be given, then the case is proven beyond a reasonable doubt, and it would be your duty to vindicate the law and uphold it by pronouncing the defendant guilty of murder, as charged in this indictment. If it is not proven to that extent, it would be your duty to vindicate the law by his acquittal.

I submit the case to you. I ask you to give it that attention, and to give its facts and the law as I have given it to you that attention, that will enable you intelligently to pass upon this case and to find a verdict sustained by the law and the facts. I ask you, as I ask you in all cases, to do that which in your judgment is necessary to uphold and vindicate and enforce the law of this land, thrown around the man killed, thrown

around the man in his grave, poor and humble though he was, as it is thrown around every citizen. Every man, the defendant, the man killed, and all others, stand upon the same plane before the law. They are all equal, they are all entitled to the law's protection, and if crime has been committed by the taking of a human life let it be spoken so that the ma'date of the law may go forth and the peace of the country may be secure.

You will find a blank form upon the back of this indictment, and if you find the defendant guilty you will sign the blank form by one of your number as foreman. If you find him not guilty you will put the word "not" in the blank and sign it by one of your number as foreman.

You will retire, gentlemen.

53 INSTRUCTIONS ASKED BY DEFENDANT.

The defendant asked the giving by the court of the following instructions, to wit:

Defendant moves the court to give each of the following instructions, which are not asked as one request presenting a series of instructions, but the defendant moves the court to give each instruction separate and severally as distinct propositions:

I.

You are further instructed that the defendant is presumed to be innocent until the contrary appears beyond a reasonable doubt, and that every reasonable doubt or presumption arising from the evidence must be construed in his favor, and that if, after considering all the evidence, there is a probability that the defendant is innocent, then he should be acquitted.

II.

The law presumes that every person charged with a crime is innocent until he is proven by competent evidence to be guilty. To the benefit of this presumption the defendant is entitled, and this presumption stands as his sufficient protection until it has been removed by evidence proving his guilt beyond a reasonable doubt.

III.

Though the evidence may leave the defense of insanity in doubt, if upon the whole evidence in the case the jury entertain a reasonable doubt as to the perfect sanity of the defendant at the time of the commission of the alleged act, they are bound to acquit him.

54 IV.

If the jury can not say beyond a reasonable doubt, arising out of the whole evidence, that the defendant was sane at the time of the commission of the alleged act, or can not say whether at that time he was sane or insane, they are bound to acquit him.

V.

Even if the evidence as to the imbecility, idiocy, or insanity of the defendant should leave it in doubt as to whether he was insane at the time of the commission of the alleged act, if it also leaves in reasonable doubt his sanity at the time of the commission of the alleged act, he is entitled to an acquittal.

VI.

If there be either incapacity by reason of mental infirmity to distinguish between right and wrong as to the particular act, or inability to refrain from doing the act, there is no legal responsibility. If, therefore, the evidence in this case shows that the defendant's mind at the time of the commission of the act charged against him was so far affected as to subvert the freedom of his will, so that he did not have the power to choose between right and wrong, though he perceived it—by which is meant the power of volition to adhere in action to the right and abstain from the wrong—then he was not in law responsible for his act.

VII.

If the mind of the defendant was so far deranged, or if on account of natural mental weakness he was at the time of the commission of the offense alleged against him incapable of using a rational judgment in regard to the act he was about to commit, then in law he was not
55 liable and should be acquitted.

VIII.

If the evidence shows that he was impelled to an act which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to commit, he would not be in law responsible for the act.

IX.

The question for the jury to determine is, Was the defendant at the time of the commission of the alleged crime as a matter of fact mentally afflicted so as to be either idiotic or otherwise insane? If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge he is not legally responsible. If he did have such knowledge he may, nevertheless, not be legally responsible if by reason of the duress of such mental disease or mental ailment he had so far lost the power to choose between the right and wrong and to avoid doing the act in question as that his free agency was at the time destroyed, and if at the same time the alleged crime was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely.

X.

If the jury have a reasonable doubt arising out of the evidence either as to the incapacity of the defendant to distinguish between right and

wrong as to the particular act, or inability on account of mental infirmity to refrain from doing the act, then he is not responsible.

56

XI.

If the jury believe from the evidence that from any predisposing cause the defendant's mind was impaired, and at the time of killing deceased he became, or was, mentally incapable of governing himself with reference to the deceased, and at the time of his doing such act was by reason of such cause unconscious that he was doing a crime as to the deceased, he is not guilty of any offense whatever.

XII.

If some controlling disease was in truth the acting power within the defendant which he could not resist, or if he had not sufficient use of his reason to control his passions which prompted the act charged against him, he is not responsible.

XIII.

If the proof shows that the mind of the accused was in a diseased and unsound state, the question will be whether this condition existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner in committing the homicide acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it.

XIV.

The test to be applied by the jury in determining defendant's responsibility for the alleged crime is, had the defendant the power to distinguish right from wrong as to the particular act, and the power to adhere to the right and avoid the wrong. If he had both, and this is established by the evidence, he would be responsible for his act; but if there is a
57 reasonable doubt arising out of the evidence as to whether or not at the time he killed the deceased he possessed both—that is, both the power to distinguish right from wrong, and to avoid the wrong—and this lack of power was on account of mental incapacity, unsoundness of the mind, then he would not in law be responsible for his act.

XV.

If the jury believe from the evidence that the defendant killed the deceased, that such killing was not in necessary self-defense, that defendant knew when he shot the deceased that death would probably result from his act, and that he intended that the shot should kill him, yet if the jury believe from the evidence that at the time the defendant shot the deceased his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature and consequence and effect of the act committed by him, or if he was impelled to the commission of the act by an insane impulse which he had not the power to resist, then he would not be guilty.

XVI.

If the jury believe from the evidence that the defendant did not kill the deceased with malice aforethought, express or implied, and if they have a reasonable doubt arising out of the whole evidence as to whether or not he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in regard to the act he was about to commit, then he would not be guilty of murder.

XVII.

Defendant asks the court to instruct on the law of manslaughter.

Defendant moves the court to give the following instruction:

58 If the jury have a reasonable doubt arising out of the evidence as to whether the defendant killed the deceased with malice aforethought, then he would not be guilty of murder but of manslaughter, if the evidence satisfies them beyond a reasonable doubt that he was not insane at the time of the commission of the act; but if from the evidence they have a reasonable doubt as to whether he was of such soundness of memory and discretion as to have done the killing deliberately, maliciously, and premeditatedly, he can not be convicted of murder.

The above and foregoing propositions asked by the defendant's counsel are refused, because those which state the law correctly have been already fully given by the charge of the court, and it can have no other effect in the case but to confuse the jury to repeat the same propositions of law. Then, again, the most of them are so framed as to have a tendency to mislead the jury and to cause them to misunderstand the propositions that they strike at.

59 *Exceptions taken by defendant to charge of court.*

To which charge of the court the defendant, in the presence of the jury and before they had retired to consider the cause, then and there excepted, as follows, to wit:

I.

Excepts to the extract read from opinion of court in Guiteau case and to the court's calling attention to the fact that he read the extract from the opinion of the court in that case.

II.

As the eminent court that tried Guiteau told the jury.

III.

Excepts to the definition of malice as given in extenso by the court, and to the extracts of opinions in other cases in defining malice.

IV.

Nor would threats be considered in order to mitigate the offense.

V.

Not that he may be unable to control his will power when in a passion or rage.

VI.

I read again from the celebrated Guiteau case. The burden is on the defendant to bring forward his proof that he is insane.

VII.

Feigned insanity would be a fraud upon justice, a cheat and outrage.

60 VIII.

Must be such as not to enable him to right from wrong, and the definition read from the on that subject.

IX.

Unless derangement so great as renders the person unable to distinguish right from wrong, insanity or partial insanity is no defense.

X.

To the part of the charge where the court discusses throwing off his will power, and remarks on that subject, as to his passion, and as to his voluntarily throwing off of his will power.

XI.

Not to find a man insane because of brutality of act. Then you would never find them guilty who go out and gentlemanly and decently kill his adversary.

XII.

To that part of the charge where court tells them where the human heart and the place it dwells when murder is committed—the place where the desire to kill dwells.

XIII.

Court's instruction as to motive and as to alleged motive, as not applicable to the case and calculated to inflame the mind and passions of the jury; and as to the extract read from Wharton. No crime logical. No crime reasonable.

XIV.

Excepts to extract read from House of Lords (growing out of MacNaughten's Case), answers to the question of delusion.

61 XV.

Excepts to all the court's instructions upon insane delusion, and to each and every sentence and paragraph of the court's charge upon insane delusion.

XVI.

Reference to insane delusion in Guiteau case, and to opinion of Judge Cox in that case.

XVII.

In this case it must be that he was acting under the delusion that Blackwell was about to kill him, and that he could not escape from it.

XVIII.

Expert testimony is a mere opinion, and you are to go behind them and investigate, and to the instruction as to expert testimony in that connection.

XIX.

Not to take the opinion of lay witnesses as to insanity, but go behind that and consider all that, and to remarks of court as to such testimony.

XX.

You are to fix the standard as to insanity. These lay witnesses, their testimony is a mere opinion.

XXI.

The charge of the court as to threats made by Blackwell as to the same being a justification.

62 XXII.

Reasonable doubt. Excepts to the court's definition of reasonable doubt, and to what he said upon that subject just before he read the extract which he stated had been given and approved by the Supreme Court.

XXIII.

Excepts to the court's refusal to charge upon manslaughter.

XXIV.

The defendant excepts sepsrately and severally to the court's refusal to give each instruction asked by the defendant.

These instructions are asked as distinct or separate propositions, and not as one request presenting a series of instructions, but each is asked, and defendant excepts to the refusal to give each one.

XXV.

Defendant excepts to the entire charge as not being applicable to the evidence and to the defense set up by defendant, and the charge is calculated to mislead the jury and does not clearly define the issue presented by the evidence.

63 Whereupon the jury retired to consider their verdict, and after deliberation returned into court the following verdict, to wit:

"We, the jury, find the defendant, Dennis Davis, guilty of murder as charged in the within indictment."

(Signed) THOS. MAYES, *Foreman.*

Whereupon the court adjudged defendant guilty of murder and sentenced him to be hanged on the 30th day of July, 1896.

And now come the said defendant, by his attorney, and tenders this his bill of exceptions and prays that the same be approved and signed and made a part of the record, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, Holding Circuit Court.

(Endorsed on back:) Filed July 25, 1896. S. Wheeler, clerk. By I. M. Dodge, D. C.

64 *Assignment of errors.*

In the United States circuit court for the western district of Arkansas.

UNITED STATES
vs. } Indictment for murder.
DENNIS DAVIS.

The defendant, Dennis Davis, files this, his assignment of errors, on the trial of said cause:

1st. It was error for the court to refuse to allow Dr. Amis to answer the question asked him by defendant, "What does medical science say as to that meaningless, vacant stare and the lower jaw hanging down in a listless way? What does medical science teach as to that?"

2nd. It was error for the court to refuse to allow witness, Dr. Amis, to answer the following question asked of him by defendant: "I will ask you whether or not, in your opinion, Dennis Davis, from your personal knowledge of him, and your examination of him, and your treatment of him, whether, in your opinion, he has sufficient mental capacity to know right from wrong as to a particular act—that is, where he would go and kill a man under circumstances where he believed that the man would kill him, or where he had been threatened by him?"

3rd. It was error for the court to refuse to allow Dr. Amis to answer the following question propounded to him by defendant during redirect examination: "You were asked in regard to motive. I will ask you if medical jurisprudence does not teach, and you have not learned it from medical jurisprudence, that insane people, people who are insane, do have a motive for the acts they commit, and act upon motives?"

4th. It was error for the court to refuse to allow Dr. Amis, during his redirect examination, to answer the following question: "Then, I will ask you if it is not true that people of unsound mind, or insane people, are very frequently cunning in the commission of acts—if your reading has not taught you to know that?"

65 5th. It was error for the court to refuse to allow Dr. Amis to answer the following question during his redirect examination:

Q. Can men of unsound mind commit an act that they know in the abstract is wrong, and yet be of unsound mind, although in a general abstract way they know the act is wrong?

A. Yes, sir.

Q. I will ask you to state whether or not you know, as a fact, that asylums are run upon that theory?

The court held that this was not competent, to which ruling of the court defendant then and there excepted.

6th. It was error for the court to permit the district attorney, in his cross-examination of Dr. Wright, to ask the witness whether he thought, from his experience with defendant, that he killed the deceased because he had threatened his life—whether he thought that from his conversation with him.

7th. It was error for the court to permit the Government to introduce Eoff in rebuttal when no notice of such witness had been served on defendant.

8th. It was error for the court to permit the Government to prove by witness, Eoff, that defendant had come to him with a proposition from the Shelleys.

9th. It was error for the court to refuse to exclude the entire testimony of witness Eoff offered in rebuttal, on the ground that the said testimony was incompetent, irrelevant, and not in rebuttal.

Said testimony was as follows:

The DIST. ATTY. Do you know Dennis Davis?

A. Yes, I do.

Q. Where have you known him?

A. In the United States jail over here.

Q. Have you had any conversation or talk with him?

A. Why, yes; quite frequently.

Q. You had some men by the name of Shelley in jail over there, did you?

A. Yes, sir.

Q. Did he ever come to you with any proposition from them?

Mr. IRA D. OGLESBY (of counsel for defendant). We object to that.

66 The DIST. ATTY. I want to show by this witness a certain course of conduct.

The COURT. You have a right to show what he did in the jail there. These physicians have made up a hypothetical opinion from their observation and what he said.

Mr. IRA D. OGLESBY (of counsel for defendant). We save an exception.

The DIST. ATTY. Tell what he did in regard to the matter.

A. There was a man named Shelley in the United States jail, and his wife was in the hospital adjoining them. She was accused of putting in

the pistol there that the killing was done with last summer; one of the guards was killed there. And during the time that Shelley was in there he come to Dennis Davis and told Dennis he would like for him to take a letter to his wife in the hospital. Dennis came to me and asked me about it. He said: "I won't do it without you say so, and let you see the letter." I said, "All right, go ahead and do it, I will make some excuse to let you go to the hospital." I asked the doctor about it and took him to the hospital any time I wanted to and let him spend the day there. He carried a dozen letters, notes, communications to Shelley's wife.

Q. Brought them all to you?

A. Yes; gave them to me, and I gave them to him and he carried them on to her.

Q. He was playing a friend to the Shelley's?

A. Yes, sir.

Q. That was his idea, to play the friend?

A. To stand in with the Shelleys and at the same time thought he would give some advantage to me, or to the officials, in finding out how the pistols got in there that the killing was done with.

Q. He seemed to understand the whole proposition, did he?

A. Well, that is what I understood from him. That is the way he went at it.

Mr. IRA D. OGLESBY (of counsel for defendant). We move to exclude this testimony as incompetent, irrelevant, and not in rebuttal.

The COURT. I think it is in rebuttal.

Mr. IRA D. OGLESBY (of counsel for defendant). We save an exception.

67 10th. It was error for the court to charge the jury as follows:

"It is necessary that I should define to you these different elements of the crime. It must be shown that the deed was done by the defendant as charged, that he intended to shoot Sol Blackwell with a gun, and that that was done wilfully—that is, intentionally, because the word 'wilful,' as used in this connection, means 'intentional' and not 'accidental.' It means, in other words, that you are to take the act as done, and by means of that act you are to find out how it was done, because although the law requires you to find the mental condition of the man who is charged with committing the act, it does not expect of you impossibilities. It affords you a reasonable method of finding that mental condition. That mental condition can not be found except by the circumstances surrounding the transaction, or that led up to it, that were connected with it, that preceded it, and the circumstances which followed it, because there is no power on earth able to get into the human mind and determine what is going on there. You must determine that by the acts done."

11th. It was error for the court to charge the jury as follows:

"Then you naturally ask, How are you to find it? You must judge of a man's purpose and of his thoughts by what he does. Suppose you see a man with your own eyes pointing a gun at another, and suppos', for example, you see a man discover another in a field at work picking cotton, and after he discovers him you would see him go off and get a Winchester or other gun; he comes back and you see him wait to get an opportunity to get a favorable shot at the man; from that fact, and from

these numerous acts you are to ascertain what you would conclude as reasonable men. You are to determine whether from these acts as done by the defendant you would say that the act of shooting was wilful upon his part; and not only that, but whether or not these acts have a connected purpose, whether they were systematic, whether they all tended toward the same result—that is, they tended towards the developed purpose of killing the man who, in this case, was in his own field at work. You are to ascertain what you would conclude from a condition of that kind if you had witnessed it, what sort of impression would be left upon your minds, or a well-founded conviction, a conviction of so certain a character that it could be defined as one beyond a reasonable doubt."

68

12th. It was error for the court to charge the jury as follows:

"Now, I say, if that state of case is reproduced before you by the evidence, you have a right to take that evidence and determine from it what is the condition of this case. It is the only way you can find the condition of his mind with reference to the act done by him. If these facts and circumstances are upon a parallel with the acts of a man of sane mind when he kills, when he prepares to do it, when he selects a deadly weapon and lies in wait for his victim to get a favorable opportunity, all these facts and these circumstances may be taken into consideration by you to show wilfulness, to show intent upon his part, and these facts and circumstances, I say, may be considered by you for that purpose. If you find that he committed all these acts, and if they are proven before you beyond a reasonable doubt, and you take into consideration further the fact that he had sufficient will power to be regarded as sane, under the law, then from these facts you would be authorized to find that the act of killing was wilful on the part of the accused, because you take into consideration, as you do, ordinarily, naturally, and reasonably, the facts presented in the shape of the character of the gun, in the shape of what he did with it after he did get it—that is to say, that he presented it upon Sol. Blackwell when the opportunity, in his judgment, was presented to make the act done by him effective, and that he pulled the trigger—these are all propositions, each and every one of them, that you have a right to take as proven when you have a state of case showing that a man did present a gun at another and kill him by firing it upon him, because a gun is inanimate, it cannot act of itself, there must be some action upon it, there must be some power which sets the deadly missile in motion, and you then take into consideration these very things to enable you to see if the act as done by him was wilful."

69

13th. It was error for the court to charge the jury as follows:

"If you have found a case before you that is shown by the evidence to that degree of certainty that it is proven beyond a reasonable doubt as to the proposition that the gun was presented by the defendant and fired upon Sol Blackwell, that would show wilfulness."

14th. It was error for the court to charge the jury as follows:

"If you will inquire, in this connection, whether there is any evidence offered here showing that this defendant had lawful authority to kill the deceased; then, on the other hand, whether there is any evidence showing deliberate intent to kill upon the part of the defendant—in

passing upon that proposition it is your duty to take into consideration every circumstance as going to characterize the act. While you are not required, in order to show the existence of malice aforethought, to find that there was any special spite entertained by the defendant against Sol Blackwell, or any peculiar hatred, or any condition of ill will entertained by the defendant against Blackwell, yet, if that condition appears, if the proof shows there was, no matter that the cause for that would be entirely inadequate for such a condition, no matter that the motive, in the shape of ill will or hatred or spite or grudge, would be entirely inadequate to the act of killing of Sol Blackwell, you are never to find motive which is proportionate; you are not required to find its existence at all, because you may find the existence of malice aforethought without it, as this eminent court, which tried Giteau, told the jury—if the proof shows that the killing was done unlawfully, and done with deliberate intent, as evidenced by the way it was done and the preparation for it, the selection of the weapon with which it was done and the goin[t] to the place to do it, the seeking of the favorable opportunity to do it; if these things, in your judgment, show deliberate intent, and there is nothing in the case which gives the defendant the right to kill, and he is of sane mind, as I will define that condition to you presently, then you must find that he is guilty of the crime of murder, because there is a condition attached to the killing known as one which characterizes the crime of murder."

15th. It was error for the court to charge the jury as follows:

"Again, the law says that if a man for some fancied or real wrong, which does not justify the act under the law, takes a human life in such a way as to show a heart void of social duty and a mind fatally bent upon mischief, that that has attending it malice aforethought, because each of us while occupying a position in society occupy a relative position. We do not stand alone; we do not live by ourselves with no duties resting upon us towards others. We have great rights belonging to us, but everybody else has the same rights, and because of the existence of these great rights, which are mutual, there rests upon us duties equally as great, which are mutual—duties towards our fellow-men. Any and every man, for example, has the right to his life as the most precious and dearest right which belongs to him until he forfeits that right under the law for his crime, and when another man wickedly, wantonly, without just cause or excuse, or in the absence of mitigating circumstances, takes his life, he is forgetting the high social duty which rests upon him not to destroy, but to protect it; to protect innocent human life, to protect unoffending life, to protect life which is entitled under the law to be protected. When he forgets that high social duty and wantonly, wickedly, and without just cause or in the absence of mitigating facts takes such a life, he is then responsible to the extent of being guilty of murder. When he does an act which is characterized by previous preparation, when he does an act characterized by lying in wait, when he does an act characterized by seeking ambush where he can safely and securely do the deadly deed, when it is an act of that character, you[b] then take into consideration these accompanying acts in the shape of his conduct to enable you to characterize the act and say what it is. When you have an act done in that way by a sane person, you have an act which

71 is accompanied with malice aforethought, because involved in malice aforethought is premeditation, is deliberation, and the fact of previous preparation shows premeditation; it shows deliberation. If a man seeks an occasion to do a thing, that is evidence that he thought of doing that thing before he executes the thought. All these circumstances are pertinent and relevant to this issue, and are to be taken into consideration by you to enable you to characterize the act. That would be a state of case where the act as done would show a heart void of social duty and a mind fatally bent upon mischief, and that is one definition of malice aforethought.

16th. It was error for the court to charge the jury as follows:

"Now, then, I say to you, if you have these circumstances as attending this killing in the shape of previous preparation, in the selection of deadly means, in the selection of an opportunity, in the hiding of the party who executes the purpose, if you find the existence of these things as attending this killing, and you find that the defendant was sane, they are circumstances you are to take into consideration to show premeditation, to show that he thought of the fact long before, to show that he considered the purpose long beforehand, to show that he contemplated the purpose, and not only that, but go behind these acts to see what were the relations between he and Blackwell, bearing in mind that the evidence of threats which has gone before you as having been made by Blackwell would not give the defendant the right to take Blackwell's life, nor would it give him the right to ask that the act be mitigated or reduced in grade, because you can not kill a man because of threats. You have no right to take his life because of threats made. Threats can not be weighed in one side of the balance against human life in the other side. That would be out of all proportion. If there was a law which provided a man should be tried for making a threat, and you were called upon to pass upon his case, and you would find him guilty, and the court would take upon itself the responsibility of sentencing him to death for such threat, you would be shocked, and the whole civilized world would be shocked at such a judgment of a court, because these acts as done by the individual are to be only

72 in proportion to the acts done by the party who kills. But you may take into consideration the threats made by Blackwell to him for the purpose of showing the relation of the parties, and then you may take that as an initial point, as a starting point, and you may follow up his conduct and see what it was, and see whether it was connected and systematic and there was continuity about it in the shape, first, of preparation by getting the gun, and then of going to the place, and then of seeking the opportunity, and then of taking the life of Blackwell. These things are especially relevant in this case to enable you to find, first, whether there was malice aforethought, and then to find what the condition of the mind of the party was, whether or not that condition shadows forth one that evidences the existence of a mind acting from malice, acting from a spirit of vengeance, acting from special spite, special hatred, special ill will, special animosity, or whether they were so disconnected or of a character that would show insanity. These things are all relevant. They must all be taken into consideration."

17th. It was error for the court to charge the jury as follows:

"When a man forms a wicked design, the execution of which will produce death, and he executes that design, if he is sane being, if he has

what the law calls a sane mind, not that he may not be able to control will power if he is in a passion or rage because of some real or imaginary grievance he may have received, and you find these other things attending the act, you would have a right to find the existence of the attributes of the crime of murder known as wilfulness and malice aforethought."

18th. It was error for the court to charge the jury as follows:

"If you have a case where the purpose to kill is manifested by preparation to kill, by the selection of a deadly weapon for the purpose of killing when the party had no right to kill, when you have these circumstances you may take them into consideration to more satisfactorily and clearly show the elements of deliberation and premeditation, or that the act was thought of beforehand."

19th. It was error for the court to charge the jury as follows:

"I now read to you again from the charge of the court in the
73 celebrated Giteau case: 'In the next place, I instruct you that every defendant is presumed innocent until the accusation against him is established by proof.

"'In the next place, notwithstanding this presumption of innocence, it is equally true that a defendant is presumed to be sane and to have been so at the time when the crime charged against him was committed; that is to say, the Government is not bound, as a part of its proofs, to show affirmatively that the defendant was sane. As insanity is the exception, and most men are sane, the law presumes the latter condition of everybody until some reason is shown to believe the contrary. The burden is therefore on the defendant, who sets up insanity as an excuse for crime, to bring forward his proofs, in the first instance, to show that the presumption is a mistake so far as it relates to him.'"

20th. It was error for the court to charge the jury as follows:

"The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it, and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which is meant the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control. This condition of insanity is one which must exist at the time of the commission of the act, and it must go to the extent defined as a condition of insanity sufficient to excuse for an act that would otherwise be a crime to enable you to sustain it as an excuse."

21st. It was error for the court to charge the jury as follows:

"A person may be afflicted with partial insanity and yet be wholly responsible to the criminal laws of his country for his criminal act. The law does not excuse in such cases unless the derangement is so great that it actually renders the person incapable of distinguishing between right and wrong."

74 22nd. It was error for the court to charge the jury as follows:

"Whenever a man from passion, from deliberate malice, from a pretended or real grievance, from a real or imaginary wrong, takes a human life, he throws off that power, that part of him known as his governing or will power, he destroys its domination, he destroys it purposely, and his passions, his malice, his dark and infamous malignity assumes its

place and rules the man. This is not a case where he was deprived of his will power so he can say he is insane. There is no such thing as crime if that is the law, because no man who takes a human life in such a way as to make it murder takes it where his will power, given him by the All-wise Being for his self-government, is not overturned, is not dethroned, is not for the time being paralyzed; but that is not insanity. He purposely sanctions this ruling passion of his, he purposely destroys his will power, that he may enter upon his bloody mission. I mean, then, not that he has voluntarily thrown off his will power because the man killed may have threatened his life, and for that reason he thinks he could take his life."

23rd. It was error for the court to charge the jury as follows:

"If threats had been made, if that part of the story is true, and he killed him by reason of these threats, by reason of threats made at different times, if the evidence shows that at the time of the killing, when he came back, that the man he killed was engaged in picking cotton, had the cotton sacks swung to him, and even the bunch of cotton in his hand when his soul, by the hand of the defendant, was ushered into eternity, if you find that state of case, then you have a state of case where you would have a right to consider that there was in it evidence of deliberation, and you would have a right to take it into consideration; these things existing before the killing, as reasons to show why he threw off his will power, that he did that voluntarily, that he threw that will power off voluntarily in order that he might take vengeance upon the object of that vengeance, for that would be a state of case over which he had control, where he was called upon by the law to control himself."

75 24th. It was error for the court to charge the jury as follows:

"As I have already told you, the law presumes that every person who has arrived at the age of discretion is of sound mind, and that presumption continues until the contrary is shown by all the evidence in the case."

25th. It was error for the court to charge the jury as follows:

"You are to bear in mind that you are not to find a man insane because of the wickedness or the brutality of the act. If you were to find every man insane for that reason, the very worst crimes would go unpunished, and you would only be called upon to find the man sane who committed murder in a decent and gentlemanly way, like gentlemen when they go out and shoot at each other in duels, or something of that kind. If he would get his gun and find his enemy in the field working, and lie in wait for him, if these are the attributes of insanity the very worst crimes would go unpunished."

26th. It was error for the court to charge the jury as follows:

"A man in a fight might be technically guilty of murder, in a contest to some extent proboked by his adversary, yet if the circumstances were such that the law would not excuse or mitigate it, he would be the one upon whose head the blow would fall; and the man of deliberate purpose, the man of preconceived design, the man of wicked motive, the man who because he had been threatened would deliberately prepare himself with a deadly agency and seek an opportunity to kill his enemy would be insane because the crime is atrocious and brutal. That is not the law."

27th. It was error for the court to charge the jury as follows:

"Now, we are to see whether the actions of the man were upon a parallel with a man of sane mind, not that you are to see that the actions of the man who kills deliberately and intentionally are on a parallel with the actions of the man of honest heart and of pure mind, because when a man conceives murder he departs from the world of honesty and of purity and uprightness and integrity. He then lives in another planet. He lives in a murderer's home. He lives in the home of the man of malice, of malignant design. He lives in the home of the man of wicked purpose. His actions from the conception of that purpose are entirely different from the actions of the man whose mind is incapable of conceiving
76 a murderous design. The human heart was not created as the habitation of a design to murder, to destroy human life. And when it becomes such, when that design becomes an inhabitant of the heart, it perverts the mind and destroys the judgment and overturns the reasoning power. So that the actions of the murderer, so that the conduct of the man who wilfully and with malice aforethought slays his fellow-man, is entirely different from the conduct of the man who is not a man of crime. Therefore, in looking for the existence of insanity, you are first to take the presumption which the law recognizes, that the defendant comes into court as a sane man, and in connection with that all the other facts and circumstances such as to show, when all the evidence has gone before you, beyond a reasonable doubt that he is sane."

28. It was error for the court to charge the jury as follows:

"You are reasonable men; you are pure-minded men; you are men who love your fellows and recognize the golden rule. Men with minds of that kind and hearts of that nature in looking for the motive of a deliberate and wicked murder would most likely overlook it because of its insignificance, according to their judgment, for, by the judgment of such men, nothing in life is adequate as a motive for such a killing, a killing that would be a wicked and deliberate murder. No motive is adequate; you can find none. The act, in the judgment of honest men, may be perfectly motiveless. The motive may be so inadequate or inconsiderable, as I have said, that they would overlook it. Now, if any man would reason deliberately and fairly before committing a murder he would not do it. It is a fact that every man who thus takes a human life has, to some extent, a perverted mind; he has a heart so perverted that he can not conceive his own interest even; he forgets his duty to his fellow-men. But the interest of society and the protection of the lives of its members will not permit us to regard every man of that kind as an insane man who is to go scot free or go unpunished."

29th. It was error for the court to charge the jury as follows:

"I wish to say a word specially upon the subject of motiveless acts. It may be of some benefit to you in this connection. Mr.
77 Wharton, upon this subject, says: 'It is sometimes argued, Is it likely that one man would kill another for so small an article? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle that the homicide was the result of sudden passion rather than lucri causa?

"'Or for a mere prejudice or spite is it likely that one man would kill another and thus expose himself to the gallows? No doubt, when a

tender mother kills a child, or a friend kills a friend, and nothing more than the fact of the killing is proved, we may be led to infer misadventure, or insanity, from the motivelessness of the act. But we have no right to make such inference, because the motive is disproportionate.

"'We are all of us apt to act on very inadequate motives, and the history of crime shows that murders are generally committed from motives comparatively trivial. A man, unaccustomed to control his passions and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. So, also, for the smallest plunder murders have been deliberately executed.

"'It is often said that a trivial motive is not a motive that could explain a lying in wait and previous preparation to do an act so cruel and with chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. The criminal does not reason as he should. He is incapable of it. He draws false conclusions, and his logic is faulty all the way through. If it was not he would not commit crime, and the fact that his logic is faulty, that his reasoning powers are not of that character which enables him to take a correct view of the situation, does not establish his insanity. Crime is rarely logical. Under a Government where the laws are executed with ordinary certainty, all crime is a plunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately pro-
78 portioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of mere trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs.'

"Now, here is the secret of this condition called murder, when it exists:

"'When a powerful passion seeks gratification, it is no extenuation that the act is illogical, for when passion is once allowed to operate, reason loosens its restraints.'"

30th. It was error for the court to charge the jury as follows:

"It does not show insanity, either, because a man acting in a state of passion brought into existence by some real or imaginary grievance, upon his part, and he kills because of that condition, and the killing is done in such a way as to show systematic preparation for the act, systematic seeking of an opportunity, an opportunity in the execution of his purpose to take advantage of his victim. The law recognizes that you are to take into consideration the fact that a man prepares himself beforehand with a deadly agency to use it illegally, not in his own self-defense, and that also when he conceals himself or lies in wait to kill his enemy, these are facts, as I have already told you, which are to be taken into consideration by you when passing upon the question as to whether there was malice aforethought here, or whether or not there was an insane condition."

31st. It was error for the court to charge the jury as follows:

"Listen to the answer made by the House of Lords in answer to a question addressed to them a good many years ago:

"'Nearly forty years ago one McNaughten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistak-

ing him for the premier himself. He was acquitted on the ground of insanity and his acquittal caused so much excitement that the House of Lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have since been regarded as settling the law on this sub-
79 ject in England, and with some qualifications have been approved in the courts in this country. One of the questions was: "If a person, under an insane delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility, as if the facts with regard to which delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed in revenge for such supposed injury, he would be liable to punishment."'"

32. It was error for the court to charge the jury as follows:

"If under the influence of his delusion he supposes another man to be in the act of taking his life, and he kills the man as he would kill in self-defense, he would then act under an insane delusion. Where there was no foundation for that, where he kills him because of threats made, then there is not that state of case which would lead you to believe that at the time of the killing he was under the delusion that the man killed—in this case the man Sol Blackwell—was in the act of taking his life, and that must exist to create a case which may be known as a case where he acts under an insane delusion, and he must kill upon that ground. To establish that, then, it must be shown that the cause of the killing was a conclusion in his mind that at the time he slew him (that is, in this case, when the man was picking cotton in the field) that Sol Blackwell was in the act of killing him when such was not the fact, that then would be an insane delusion. But if he killed Sol Blackwell while Blackwell was at work, because of threats made that had been made, you may take that condition into consideration as evidence of deliberation, as evidence of design, as evidence showing previous preparation, as evidence showing, under the circumstances of this case, lying in wait, showing the doing of an act systematically and with continuity of purpose, and it does not show that the defendant acted under the
80 insane delusion that Blackwell was at the time trying to take his life.

33rd. It was error for the court to charge the jury as follows:

"If he killed because of threats, then there would not be anything to show that Blackwell at the time of the killing had an immediate design upon his life, or that he was in the act of doing anything of that kind. It would not show, in other words, that the killing was caused by the conception in the mind of the defendant that Blackwell was then and there in the act of taking his life, when such was not the fact."

34th. It was error for the court to charge the jury as follows:

"In this case, I repeat, it must have been a state of case where the defendant acted under the belief at the time he killed Blackwell that Blackwell was in the act of killing him, in the act of perpetrating upon him an act of deadly violence, or that he might do him some great bod-

ily harm, then and there, and that he could not reasonable escape from such condition, that would be an insane delusion which would excuse."

35th. It was error for the court to charge the jury as follows:

"Evidence has been offered to you for the purpose of showing that condition of mind which would excuse the defendant for the killing of Sol Blackwell. That evidence is of two kinds. That is, the evidence of experts who give you their opinions upon what is called a hypothetical case, and it is sufficient to say in this connection as to that sort of evidence that it is simply the opinion of the man who gives it that goes to you as expert testimony. You are not to stop with that opinion and take it as conclusive, but you are to go behind it, and to give it proving power as you may believe it is sustained by the reasons given by the expert, depending upon the opportunity he had for observation. If he gives you his deductions as a medical man, then you are to take those statements as matters of opinion, and you are to go behind them *a* and see what opportunities he had for making the observation, for founding a conviction, for coming to a conclusion; to see if at the time the observations were made whether the condition of the party was real or feigned. These are facts which are to be taken into account. And then you are to look to
81 these things to see to what extent they prove the condition of mind of the party—that is to say, whether they prove that state of insanity that I have defined which excuses, or whether they simply prove a condition of feeble mind which would not excuse if he was still capable of knowing the right from the wrong with reference to the particular act and to judge of the character of that act."

36th. It was error for the court to charge the jury as follows:

"You are to take into consideration all the circumstances, take into consideration his ability to earn a livelihood, and the fact of his earning a livelihood and raising a family. All these things are to be taken into account. Then, in passing upon the testimony of these lay witnesses, in passing upon their opinions, you are to see to what extent they go, whether they pronounce him insane themselves or whether they simply say he was not a man of good judgment, or that he was eccentric or peculiar, or whatever the facts may be. You are to get at the foundation of the opinion given by all the witnesses, and the reasons given for these opinions."

37th. It was error for the court to charge the jury as follows:

"You are to see with reference to these physicians what opportunity they had for making an investigation, whether they were comparatively limited, or whether they were personally acquainted with this man for a long time, and whether or not his peculiar condition spoken of by Dr. Wright was one which might be produced by physical debility, by sickness of body."

38th. It was error for the court to charge the jury as follows:

"It is for you to take the standard of the law which defines insanity, and by that standard you are to weigh this case. These statements made by lay witnesses when they give you their opinion as to his mental condition are mere matters of opinion—witnesses who may have known the man—mere common people. They are all competent to give opinions upon matters of this kind from their association with the party, from their observation of his conduct through the period they may have

known him. You take the opinions of these men who come in
82 here and say they know the defendant and undertake to give you opinions, and see how they are sustained by reasons offered by them. A bald, naked opinion given by a party as to the mental condition of another, not sustained by sufficient reasons to give it weight, as a proving fact would not have that power that an opinion would which was sustained by competent reasons."

39th. It was error for the court to charge the jury as follows:

"Courts of justice everywhere agree that neither the bad character of the deceased"—but that is not proven in this case; there is no evidence upon the question of the bad character of the deceased, Sol Blackwell—"nor any threats that he may have made forfeits his right to life until by some actual attempt to execute his threats or by some act or demonstration at the time of the killing taken in connection with such character and threats he induces a reasonable belief on the part of the slayer that it was necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

40th. It was error for the court to charge the jury as follows:

"Now, these threats, of course, made by Blackwell were called out and were offered by the district attorney upon the part of the Government. They can not be taken into consideration to reduce the grade of this crime or to justify it. They may be taken into consideration, having been made to the defendant, to show the relations which existed between these parties to enable you to see whether or not this defendant acted from deliberation, from premeditation, from a condition of special spite, special hatred, or ill will against Sol Blackwell, or whether he acted in a condition and under such circumstances as to indicate that his mind was to that extent insane that he was unconscious of the nature of the act he did, or was incapable of knowing the right from the wrong without reference to that particular act."

41st. It was error for the court to charge the jury as follows:

"It is sometimes believed by persons that there is a great mystery about this idea that a proposition must be proven beyond a reasonable
83 doubt, and you occasionally almost see the minds of men try to stretch into the future to see if there is a mystic and impossible condition that they can attain where a proposition is proven in that way. There is nothing of the kind attending it."

42nd. It was error for the court to charge the jury as follows:

"I submit the case to you. I ask you to give it that attention, and to give its facts and the law as I have given it to you that attention that will enable you to find a verdict sustained by the law and the facts. I ask you, as I ask you in all cases, to do that which in your judgment is necessary to uphold and vindicate and enforce the law of this land, thrown around the man killed, thrown around the man in his grave, poor and humble though he was, as it is thrown around every citizen. Every man—the defendant, the man killed, and all others—stand upon the same plane before the law. They are all equal, they are all entitled to the law's protection, and if crime has been committed by the taking of a human life let it be spoken so that the mandate of the law may go forth and the peace of the country may be secure."

43rd. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"You are further instructed that the defendant is presumed to be innocent until the contrary appears beyond a reasonable doubt, and that every reasonable doubt or presumption arising from the evidence must be construed in his favor, and that if, after considering all the evidence, there is a probability that the defendant is innocent, then he should be acquitted."

44th. It was error for the court to refuse to give the following instruction, as requested by defendant:

"The law presumes that every person charged with crime is innocent until he is proven by competent evidence to be guilty. To the benefit of this presumption the defendant is entitled, and this presumption stands as his sufficient protection until it has been removed by evidence proving his guilt beyond a reasonable doubt."

45th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

84 "Though the evidence may leave the defense of insanity in doubt, if upon the whole evidence in the case the jury entertain a reasonable doubt as to the perfect sanity of the defendant at the time of the commission of the alleged act, they are bound to acquit him."

46th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the jury can not say beyond a reasonable doubt, arising out of the whole evidence, that the defendant was sane at the time of the commission of the alleged act, or can not say whether at that time he was sane or insane, they are bound to acquit him."

47th. It was error for the court to refuse to charge the jury as follows, as asked by defendant:

"Even if the evidence as to the imbecility, idiocy, or insanity of the defendant should leave it in doubt as to whether he was insane at the time of the commission of the alleged act, if it also leaves in reasonable doubt his sanity at the time of the commission of the alleged act, he is entitled to an acquittal."

48th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If there be either incapacity by reason of mental infirmity to distinguish between right and wrong as to the particular act, or inability to refrain from doing the act, there is no legal responsibility. If, therefore, the evidence in this case shows that the defendant's mind at the time of the commission of the act charged against him was so far affected as to subvert the freedom of his will, so that he did not have the power to choose between right and wrong, though he perceived it, by which is meant the power of volition to adhere in action to the right and abstain from the wrong—then he was not in law responsible for his act."

49th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the mind of the defendant was so far deranged, or if on account of natural mental weakness he was at the time of the commission
85 of the offense alleged against him incapable of using a rational judgment in regard to the act he was about to commit, then in law he was not liable and should be acquitted."

50th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the evidence shows that he was impelled to an act which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to commit, he would not be in law responsible for his act."

51st. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"The question for the jury to determine is, Was the defendant at the time of the commission of the alleged crime, as a matter of fact, mentally afflicted so as to be either idiotic or otherwise insane? If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible. If he did have such knowledge, he may, nevertheless, not be legally responsible if by reason of the duress of such mental disease or mental ailment he had so far lost the power to choose between the right and wrong and to avoid doing the act in question as that his free agency was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely."

52nd. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the jury have a reasonable doubt arising out of the evidence either as to the incapacity of the defendant to distinguish between right and wrong as to the particular act, or inability on account of mental infirmity to refrain from doing the act, then he is not responsible."

53rd. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

86 "If the jury believe from the evidence that from any predisposing cause the defendant's mind was impaired, and at the time of killing deceased he became or was mentally incapable of governing himself with reference to the deceased, and at the time of his doing such act was by reason of such cause unconscious that he was doing a crime as to the deceased, he is not guilty of any offense whatever."

54th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If some controlling disease was in truth the acting power within the defendant which he could not resist, or if he had not sufficient use of his reason to control his passions which prompted the act charged against him he is not responsible."

55th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the proof shows that the mind of the accused was in a diseased and unsound state the question will be whether this condition existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner in committing the homicide acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of a body without the concurrence of a mind directing it."

56th. It was error for the court to refuse to charge the jury as follows, as asked by defendant:

"The test to be applied by the jury in determining defendant's respon-

sibility for the alleged crime is, had the defendant the power to distinguish right from wrong as to the particular act and the power to adhere to the right and avoid the wrong? If he had both, and this is established by the evidence, he would be responsible for his act; but if there is a reasonable doubt arising out of the evidence as to whether or not at the time he killed the deceased he possessed both—that is, both the power to distinguish right from wrong and to avoid the wrong—and this
87 lack of power was on account of mental incapacity, unsoundness of the mind, then he would not be in law responsible for his act."

57th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the jury believe from the evidence that the defendant killed the deceased, that such killing was not in necessary self-defense, that defendant knew when he shot the deceased that death would probably result from his act, and that he intended that the shot should kill him, yet if the jury believe from the evidence that at the time the defendant shot the deceased his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature and consequence and effect of the act committed by him, or if he was impelled to the commission of the act by an insane impulse which he had not the power to resist, then he would not be guilty."

58th. It was error for the court to refuse to charge the jury as follows, as asked by defendant:

"If the jury believe from the evidence that the defendant did not kill the deceased with malice aforethought, express or implied, and if they have a reasonable doubt arising out of the whole evidence as to whether or not he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in regard to the act he was about to commit, then he would not be guilty of murder."

59th. It was error for the court to refuse to instruct the jury upon the law of manslaughter, as asked by the defendant.

60th. It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the jury have a reasonable doubt arising out of the evidence as to whether the defendant killed the deceased with malice aforethought, then he would not be guilty of murder, but of manslaughter, if the evidence satisfies them beyond a reasonable doubt that he was not insane at the time of the commission of the act; but if, from the evidence, they
88 have a reasonable doubt as to whether he was of such soundness of memory and discretion as to have done the killing deliberately, maliciously, and premeditatedly, he cannot be convicted of murder."

Wherefore, by reason of the above stated errors, the said defendant prays that the judgment and sentence against him be reversed and a new trial be granted him.

DENNIS DAVIS.
By IRA D. OGLESBY and EMIL MYER,
His Attorneys.

(Endorsed on back:) Filed July 25th, 1896. S. Wheeler, clerk. By I. M. Dodge, D. C.

89 *Poverty affidavit.*

In the circuit court of the United States for the west. district of Arkansas.

UNITED STATES }
vs. } Murder.
DENNIS DAVIS. }

I, Dennis Davis, the defendant in the above-entitled cause, do solemnly swear that I am not possessed of sufficient means, and am actually unable to procure the same, to prosecute the appeal taken in said case to the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperis.

DENNIS DAVIS.

Subscribed and sworn to before me this 15th day of July, A. D. 1896.

STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed July 25, '96. S. Wheeler, clk. By I. M. Dodge, D. C.

90 *Petition for writ of error.*

United States circuit court, western district of Arkansas.

UNITED STATES }
vs. } Murder.
DENNIS DAVIS. }

To the Clerk of the Circuit Court of the United States for the Western District of Arkansas:

Your petitioner, Dennis Davis, represents that at the May term, A. D. 1896, of said court, he was convicted of an indictment charging him with the crime of murder, and that the said court pronounced judgment and sentence of death upon your petitioner upon the verdict of the jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing said cause and the record therein to the said Supreme Court, in order that the same may be there examined, and, if error be found, that judgment and sentence against him therein may be reversed.

DENNIS DAVIS.
By his attorneys, IRA D. OGLESBY and EMIL MAYER.

(Endorsed on back:) "Filed July 25, '96. S. Wheeler, clk. By I. M. Dodge, D. C."

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the U. S. circuit court for the western dist. of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States, plaintiff, and Dennis Davis, dft., a manifest error hath happened, to the great damage of the said Dennis Davis, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25 day of July, in the year of our Lord one thousand eight hundred and ninety-six.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States
for the Western Dist. of Arkansas.

Allowed by

Justice of the Supreme Court of the United States.

92 UNITED STATES OF AMERICA, *ss:*

To United States of America, western dist. of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the western dist. of Arkansas, wherein Dennis Davis, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable J. C. Parker, U. S. dist. judge for the western dist. of Arkansas, this 25 day of July, in the year of our Lord one thousand eight hundred and ninety-six.

J. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

92½ (Indorsed:) I hereby accept service of the within citation, this 25th day of July, 1896.

JAS. F. READ,
U. S. Atty.

93 UNITED STATES OF AMERICA,
Western district of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true copy of the record and proceedings in the case of U. S. vs. Dennis Davis, the original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 29 day of July, A. D. 1896.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 16356. Term No. 577. Dennis Davis, plaintiff in error, vs. The United States. W. Arkansas C. C. U. S. Supreme Court U. S. Clerk's office. Received Aug. 10, 1896. Filed August 10, 1896.

165-373

165-373

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DENNIS DAVIS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 577.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DENNIS DAVIS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 577.

MOTION TO ADVANCE.

This is the second conviction of Davis, in the circuit court of the United States for the western district of Arkansas, for the murder of one Sol Blackwell, at the Creek Nation, in the Indian country, the judgment on the former verdict against him having been reversed by this court and a new trial ordered. (160 U. S., 469.)

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on the counsel for the defendant below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

4969

165-373

165-373

Office Supreme Court, U. S.
FILED.
JAN 20 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DENNIS DAVIS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 577.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DENNIS DAVIS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 577.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here for the second time, having been reversed at the last term of this court. (See *Davis* v. *United States*, 160 U. S., 469.)

Davis, a negro and not an Indian, was indicted for shooting and killing, on the 18th day of September, 1894, at the Creek Nation, in the Indian country, Sol. Blackwell, a negro and not an Indian. (Rec., p. 1.) He was tried, found guilty, and sentenced to be hanged. (Rec., p. 3.)

The testimony for the Government tended to show that the deceased and the defendant, about a week before the killing, had a misunderstanding in regard to the making of the sugar-cane crop which the defendant was making for deceased on land rented from deceased—the defendant refusing to "make up" the one-half of the cane belonging to deceased; that about a week after this misunderstanding the defendant took a gun, slipped up to near where the deceased was at work picking cotton, shot the deceased and killed him while the deceased was at work, unarmed; that thereupon the defendant ran away from the place where the shot was fired, went immediately to the nearest town, and surrendered himself to the officers, telling them that he had killed deceased, and detailing how he had killed him as above set out; that defendant made no effort to conceal the fact that he had killed deceased, and that he stated that the deceased had made threats against him. (Rec., pp. 4, 5.)

When brought before the commissioner, defendant admitted the killing and wanted to plead guilty to the charge against him, and insisted on pleading guilty prior to entering into an examination of the case, but the commissioner would not permit him to do so, informing him that he had the right to make a statement if he desired to do so, but if he made one it could be used against him, and advised the defendant not to make any, but the defendant insisted upon making the statement and was duly sworn as a witness. His testimony before the commissioner is set out on pages 5 to 7 of the record.

The testimony introduced for the defense tended to show that the deceased a few days before the killing threatened the defendant; that two days before the killing deceased went to defendant's house with a gun, made threats against his life, and attempted to get defendant to come out of his house, which defendant refused to do; and that the defendant was insane. (Rec., pp. 8–12.)

POINTS AND ARGUMENT.

There are sixty assignments of error, covering sixteen pages of the record. No brief has been filed for plaintiff in error, and there is nothing to indicate which of the assignments are considered good and which would not be insisted on before this court. They have been made up in accordance with a practice which seems to have prevailed before the court from which this case comes, of objecting to almost everything the judge did in the case.

In this case assignments 43 to 60, inclusive, are for refusals of the judge to charge requests made. These requests were doubtless handed in before the charge was delivered, and were formally repeated after the charge. The charge covers very many of them in language equivalent to that in which they are drawn.

Only those assignments will be particularly treated of which seem, upon their face, to suggest doubtful points.

I.

First assignment.

The first assignment of error is as follows:

> It was error for the court to refuse to allow Dr. Amis to answer the question asked him by defend-

ant, "What does medical science say as to that meaningless, vacant stare and the lower jaw hanging down in a listless way? What does medical science teach as to that?" (Rec., p. 39.)

Amis, a physician, was introduced and qualified as an expert witness. He had observed the defendant in jail, and had treated him for a month or two. He described his appearance and acts, and, among other things, said that defendant "would sit and gaze in a dreamy, melancholy way, with his mouth open and under jaw hanging down, having a vacant, meaningless stare." After stating these facts the witness was then asked the question as set out above in the assignment of error. The question was objected to, no ground being stated, and the court sustained the objection and refused to permit the witness to answer the question, to which action of the court exception was taken. (Rec., p. 9.)

It does not appear that this witness gave any opinion as to the sanity or insanity of the defendant based upon his observations merely. He did give an opinion as to the defendant's sanity based upon a hypothetical state of facts. Among the facts enumerated were those of staring vacantly, with under jaw hanging down, and expressionless face.

The question on this assignment arises as to whether or not it was error for the court to exclude a question asking what medical science said in regard to certain symptoms and conditions which witness had testified he had observed in the defendant.

If the witness, as an expert, had given an opinion that a meaningless, vacant stare and the lower jaw hang-

ing down in a listless way indicated insanity, then it would have been competent to show that this opinion was sanctioned by medical science. (*Collier* v. *Simpson*, 5 C. & P., 460.)

The opinion that was given by the witness was based upon these facts, taken in connection with a number of other facts. His testimony was that a person affected with the symptoms set out in the hypothetical case stated was insane. The defense got the benefit of his opinion upon these facts, taken in connection with other facts. The record does not show what answer would have been made by the witness.

If he had said that it was a symptom indicating insanity, then this answer would have been in effect just what the witness did say when the hypothetical question, involving these facts, was put to him. Why the question was excepted to is not apparent, but, inasmuch as defendant got the benefit of the opinion of the witness, it must have been based upon his knowledge of the medical science which would have guided him in answer to the question, and it seems that no prejudice could have resulted from the action of the court.

II.

Second and fifth assignments.

These assignments have nothing to sustain them. Everything relating to the testimony of Dr. Amis appears upon pages 9 and 10 of the record, and there is nothing to show that any such questions as those set out in these assignments were asked.

III.

Third and fourth assignments.

The third assignment of error is as follows:

> It was error for the court to refuse to allow Dr. Amis to answer the following question propounded to him by defendant during redirect examination: "You were asked in regard to motive. I will ask you if medical jurisprudence does not teach, and you have not learned it from medical jurisprudence, that insane people—people who are insane—do have a motive for the acts they commit, and act upon motives?" (Rec., p. 39.)

The fourth assignment of error is as follows:

> It was error for the court to refuse to allow Dr. Amis, during his redirect examination, to answer the following question: "Then I will ask you if it is not true that people of unsound mind, or insane people, are very frequently cunning in the commission of acts—if your reading has not taught you to know that?" (Rec., p. 40.)

These questions and the exceptions and rulings of the court appear upon page 10 of the record.

The questions were leading, were excepted to, and the exceptions were sustained by the court. The ground of exception is not stated, and not being set out, if the questions were incompetent for any reason, the action of the court would not now be held erroneous.

IV.

Sixth assignment.

The sixth assignment of error is as follows:

> It was error for the court to permit the district attorney, in his cross-examination of Dr. Wright,

to ask the witness whether he thought, from his experience with defendant, that he killed the deceased because he threatened his life—whether he thought that from his conversation with him. (Rec., p. 40.)

This is based upon the following:

Witness was then asked by district attorney the following question: "You think from your experience with him, from your conversation with him, that he killed the man because he threatened his life; your idea is that he killed the man because he threatened his life?" to which question the defendant at the time objected, the objection was overruled, and the witness permitted to answer the question, to which action of the court the defendant then and there at the time excepted, because the said question was incompetent and irrelevant and sought to elicit testimony that was not competent. The witness then answered: "Well, in part; and because he thought his own life was in danger, and because he thought he had the right to destroy this menace to his own life."

Which answer was by the defendant objected to as incompetent and irrelevant; objection overruled, and defendant at the time excepted. (Rec., p. 11.)

Even if the question was incompetent, no injury could have resulted from the answer, which was that the defendant acted in part because he thought he had a right to destroy this menace to his own life. If he acted in part for this reason, such action, under the testimony and the law as given to the jury, was that of an insane man, and the answer, therefore, was beneficial and not prejudicial to the defendant. If, however, a different view be taken, the cross-examination is sustainable on another

ground. The witness had testified from his own knowledge and observation of the symptoms and conduct of the defendant that "he did not have sufficient mental capacity to distinguish right from wrong *as to the particular act charged against him*, and that in his opinion because of mental weakness the defendant did not have such power of inhibition as to abstain from the wrong and adhere to the right." (Rec., p. 10.)

After having given an expression of opinion in regard to the conduct of the defendant in respect of the particular act charged against him, this opinion being based upon the "acts, conduct, and expression of defendant," as observed by him, it was competent, in cross-examination, to weaken the force of this opinion by showing that upon the same state of facts the witness who had given this opinion thought that defendant, in respect of the particular act charged against him, acted from a motive, motive being one of the elements which the jury had a right to consider in determining whether or not the conduct of the defendant was that of a sane or insane man.

The question would not have been admissible on direct examination if the witness had been introduced by the Government, but as cross-examination, testing the value of witness's opinion, and the consistency of his opinions, the question was admissible, even if the answer had been different, and had been unfavorable to the defendant. The defendant himself had stated "that the deceased had made threats against him, and that he had gone over to where the deceased was picking cotton and shot him." The evidence of the defendant established threats upon the part of the deceased against the defendant. (Rec., p. 8.)

V.

Seventh, eighth, and ninth assignment.

The seventh assignment of error is as follows:

> It was error for the court to permit the Government to introduce Eoff in rebuttal when no notice of such witness had been served on defendant. (Rec., p. 40.)

The eighth assignment of error is as follows:

> It was error for the court to permit the Government to prove by witness, Eoff, that defendant had come to him with a proposition from the Shelleys. (Rec., p. 40.)

The ninth assignment of error is as follows:

> It was error for the court to refuse to exclude the entire testimony of witness Eoff offered in rebuttal, on the ground that the said testimony was incompetent, irrelevant, and not in rebuttal.
>
> Said testimony was as follows:
>
> The DISTRICT ATTORNEY. Do you know Dennis Davis?
>
> A. Yes, I do.
>
> Q. Where have you known him?
>
> A. In the United States jail over here.
>
> Q. Have you had any conversation or talk with him?
>
> A. Why, yes; quite frequently.
>
> Q. You had some men by the name of Shelly in jail over there, did you?
>
> A. Yes, sir.
>
> Q. Did he ever come to you with any proposition from them?
>
> Mr. IRA D. OGLESBY (of counsel for defendant). We object to that.
>
> The DISTRICT ATTORNEY. I want to show by this witness a certain course of conduct.

The COURT. You have a right to show what he did in the jail there. These physicians have made up a hypothetical opinion from their observation and what he said.

Mr. IRA D. OGLESBY (of counsel for defendant). We save an exception.

The DISTRICT ATTORNEY. Tell what he did in regard to the matter.

A. There was a man named Shelley in the United States jail, and his wife was in the hospital adjoining them. She was accused of putting in the pistol there that the killing was done with last summer; one of the guards was killed there. And during the time that Shelley was in there he come to Dennis Davis, and told Dennis he would like for him to take a letter to his wife in the hospital. Dennis came to me and asked me about it. He said: "I won't do it without you say so, and let you see the letter." I said, "All right, go ahead and do it; I will make some excuse to let you go to the hospital." I asked the doctor about it, and took him to the hospital any time I wanted to, and let him spend the day there. He carried a dozen letters, notes, communications to Shelley's wife.

Q. Brought them all to you?

A. Yes; gave them to me, and I gave them to him, and he carried them on to her.

Q. He was playing a friend to the Shelleys?

A. Yes, sir.

Q. That was his idea, to play the friend?

A. To stand in with the Shelleys and at the same time thought he would give some advantage to me, or to the officials, in finding out how the pistols got in there that the killing was done with.

Q. He seemed to understand the whole proposition, did he?

A. Well, that is what I understood from him. That is the way he went at it.

Mr. IRA D. OGLESBY (of counsel for defendant). We move to exclude this testimony as incompetent, irrelevant, and not in rebuttal.

The COURT. I think it is in rebuttal.

Mr. IRA D. OGLESBY (of counsel for defendant). We save an exception. (Rec., pp. 40, 41.)

This testimony was clearly in rebuttal. The testimony for the Government established the killing. It was then undertaken to show, on behalf of the defense, that Davis was insane. Witnesses were introduced, expert and nonexpert, showing his habits of life and conduct at various times and under various circumstances. The testimony of Eoff (pp. 11 and 12 of the record) tended directly to countervail the force of this evidence, and to show that Davis was rational, had method, and could act upon and carry out a concerted plan involving caution and discretion.

The statute providing for a list of the witnesses which are to be produced on the trial for proving the indictment to be delivered to the accused does not extend to such witnesses as may be rendered necessary for rebuttal purposes resulting from the testimony introduced by the accused in his defense. (*Goldsby* v. *United States*, 160 U. S., 70, 76.)

VI.

Tenth, eleventh, twelfth, and thirteenth.

The tenth assignment of error is as follows:

It was error for the court to charge the jury as follows:

"It is necessary that I should define to you these different elements of the crime. It must be shown

that the deed was done by the defendant as charged, that he intended to shoot Sol Blackwell with a gun, and that that was done willfully—that is, intentionally, because the word 'willful,' as used in this connection, means 'intentional' and not 'accidental.' It means, in other words, that you are to take the act as done, and by means of that act you are to find out how it was done, because although the law requires you to find the mental condition of the man who is charged with committing the act, it does not expect of you impossibilities. It affords you a reasonable method of finding that mental condition. That mental condition can not be found except by the circumstances surrounding the transaction, or that led up to it, that were connected with it, that preceded it, and the circumstances which followed it, because there is no power on earth able to get into the human mind and determine what is going on there. You must determine that by the acts done." (Rec., p. 41.)

The eleventh assignment of error is as follows:

It was error for the court to charge the jury as follows:

"Then you naturally ask, How are you to find it? You must judge of a man's purpose and of his thoughts by what he does. Suppose you see a man with your own eyes pointing a gun at another, and suppose, for example, you see a man discover another in a field at work picking cotton, and after he discovers him you would see him go off and get a Winchester or other gun; he comes back and you see him wait to get an opportunity to get a favorable shot at the man; from that fact, and from these numerous acts you are to ascertain what you would conclude as reasonable men. You are to determine whether from these acts as done by the defendant

you would say that the act of shooting was willful upon his part; and not only that, but whether or not these acts have a connected purpose, whether they were systematic, whether they all tended toward the same result—that is, they tended towards the developed purpose of killing the man who, in this case, was in his own field at work. You are to ascertain what you would conclude from a condition of that kind if you had witnessed it, what sort of impression would be left upon your minds, or a well-founded conviction, a conviction of so certain a character that it could be defined as one beyond a reasonable doubt." (Rec., p. 42.)

The twelfth assignment of error is as follows:

Now, I say, if that state of case is reproduced before you by the evidence, you have a right to take that evidence and determine from it what is the condition of this case. It is the only way you can find the condition of his mind with reference to the act done by him. If these facts and circumstances are upon a parallel with the acts of a man of sane mind when he kills, when he prepares to do it, when he selects a deadly weapon and lies in wait for his victim to get a favorable opportunity, all these facts and these circumstances may be taken into consideration by you to show willfulness, to show intent upon his part; and these facts and circumstances, I say, may be considered by you for that purpose. If you find that he committed all these acts, and if they are proven before you beyond a reasonable doubt, and you take into consideration further the fact that he had sufficient will power to be regarded as sane, under the law, then from these facts you would be authorized to find that the act of killing was willful on the part of the accused, because you take into

consideration, as you do, ordinarily, naturally and reasonably, the facts presented in the shape of the character of the gun, in the shape of what he did with it after he did get it—that is to say, that he presented it upon Sol. Blackwell when the opportunity, in his judgment, was presented to make the act done by him effective, and that he pulled the trigger—these are all propositions, each and every one of them, that you have a right to take as proven when you have a state of case showing that a man did present a gun at another and kill him by firing it upon him, because a gun is inanimate, it can not act of itself, there must be some action upon it, there must be some power which sets the deadly missile in motion, and you then take into consideration these very things to enable you to see if the act as done by him was willful. (Rec., p. 42.)

The thirteenth assignment of error is as follows:

> It was error for the court to charge the jury as follows: "If you have found a case before you that is shown by the evidence to that degree of certainty that it is proven beyond a reasonable doubt as to the proposition that the gun was presented by the defendant and fired upon Sol. Blackwell, that would show willfulness." (Rec., p. 42.)

The only exception upon which these assignments can be based is as follows:

> Defendant excepts to the entire charge as not being applicable to the evidence and to the defense set up by defendant, and the charge is calculated to mislead the jury and does not clearly define the issue presented by the evidence. (Rec., p. 39.)

This is a general exception to the charge, which does not direct the attention of the court to the particular por-

tions of it to which objection is made, and therefore raises no question for review. (*Holder* v. *United States*, 150 U. S., 91, 92.)

It is insisted, however, that there is nothing objectionable in the above charge on the question of intent, being similar to the charge in the case of *Acers* v. *United States* (164 U. S., 388), which was approved by this court.

VII.

Fourteenth, twenty-eighth, and twenty-ninth assignments.

The fourteenth assignment of error is as follows:

> It was error for the court to charge the jury as follows:
>
> If you will inquire, in this connection, whether there is any evidence offered here showing that this defendant had lawful authority to kill the deceased; then, on the other hand, whether there is any evidence showing deliberate intent to kill upon the part of the defendant—in passing upon that proposition it is your duty to take into consideration every circumstance as going to characterize the act. While you are not required, in order to show the existence of malice aforethought, to find that there was any special spite entertained by the defendant against Sol. Blackwell, or any peculiar hatred, or any condition of ill-will entertained by the defendant against Blackwell, yet, if that condition appears, if the proof shows there was, no matter that the cause for that would be entirely inadequate for such a condition, no matter that the motive, in the shape of ill-will or hatred, or spite or grudge, would be entirely inadequate to the act of killing of Sol. Blackwell, you are never to find motive which is proportionate;

you are not required to find its existence at all, because you may find the existence of malice aforethought without it, as this eminent court, which tried Guiteau, told the jury—if the proof shows that the killing was done unlawfully, and done with deliberate intent, as evidenced by the way it was done and the preparation for it, the selection of the weapon with which it was done and the going to the place to do it, the seeking of the favorable opportunity to do it—if these things in your judgment show deliberate intent, and there is nothing in the case which gives the defendant the right to kill, and he is of sane mind, as I will define that condition to you presently, then you must find that he is guilty of the crime of murder, because there is a condition attached to the killing known as one which characterizes the crime of murder." (Rec., pp. 42, 43.)

The twenty-eighth assignment of error is as follows:

It was error for the court to charge the jury as follows:

"You are reasonable men; you are pure-minded men; you are men who love your fellows and recognize the golden rule. Men with minds of that kind and hearts of that nature in looking for the motive of a deliberate and wicked murder would most likely overlook it because of its insignificance, according to their judgment, for, by the judgment of such men, nothing in life is adequate as a motive for such a killing, a killing that would be a wicked and deliberate murder. No motive is adequate; you can find none. The act, in the judgment of honest men, may be perfectly motiveless. The motive may be so inadequate or inconsiderable, as I have said, that they would overlook it. Now, if any man would reason deliberately and fairly before committing a murder, he would not do it. It is a fact that every

man who thus takes a human life has, to some extent, a perverted mind; he has a heart so perverted that he can not conceive his own interest even; he forgets his duty to his fellow-men. But the interest of society and the protection of the lives of its members will not permit us to regard every man of that kind as an insane man who is to go scot free or go unpunished." (Rec., p. 47.)

The twenty-ninth assignment of error is as follows:

It was error for the court to charge the jury as follows:

"I wish to say a word specially upon the subject of motiveless acts. It may be of some benefit to you in this connection. Mr. Wharton, upon this subject, says: 'It is sometimes argued, Is it likely that one man would kill another for so small an article? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle that the homicide was the result of sudden passion rather than lucri causa?

"'Or for a mere prejudice or spite is it likely that one man would kill another, and thus expose himself to the gallows? No doubt, when a tender mother kills a child or a friend kills a friend, and nothing more than the fact of the killing is proved, we may be led to infer misadventure or insanity, from the motivelessness of the act. But we have no right to make such inference because the motive is disproportionate.

"'We are all of us apt to act on very inadequate motives, and the history of crime shows that murders are generally committed from motives comparatively trivial. A man unaccustomed to control his passions and unregulated by religious or moral

sense exaggerates an affront or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. So, also, for the smallest plunder murders have been deliberately executed.

"'It is often said that a trivial motive is not a motive that could explain a lying in wait and previous preparation to do an act so cruel and with chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. The criminal does not reason as he should. He is incapable of it. He draws false conclusions, and his logic is faulty all the way through. If it was not he would not commit crime; and the fact that his logic is faulty, that his reasoning powers are not of that character which enables him to take a correct view of the situation, does not establish his insanity. Crime is rarely logical. Under a Government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of mere trifles, to forge wills, to kidnap, and kill, so that an inheritance might be theirs.'

"Now, here is the secret of this condition called murder, when it exists:

"'When a powerful passion seeks gratification, it is no extenuation that the act is illogical, for when passion is once allowed to operate, reason loosens its restraints.'" (Rec., pp. 47, 48.)

These assignments are based upon the following exceptions:

> Court's instruction as to motive and as to alleged motive, as not applicable to the case and calculated to inflame the mind and passions of the jury; and as to the extract read from Wharton. No crime logical. No crime reasonable. (Rec., p. 37.)
>
> As the eminent court that tried Guiteau told the jury. (Rec., p. 36.)
>
> Excepts to the definition of malice as given in extenso by the court and to the extracts of opinions in other cases in defining malice. (Rec., p. 36.)

The above reference to the Guiteau Case and the extract read from Wharton were merely by way of illustration, and are not ground for the reversal of the judgment. (*Pointer* v. *United States*, 151 U. S., 396, 416.)

The above instructions upon the question of motive are entirely correct. A similar charge was approved by this court in the Pointer Case (pp. 413, 414).

VIII.

Nineteenth and sixtieth assignments.

The nineteenth assignment of error is as follows:

> It was error for the court to charge the jury as follows: "I now read to you again from the charge of the court in the celebrated Guiteau Case: 'In the next place, I instruct you that every defendant is presumed innocent until the accusation against him is established by proof.
>
> "'In the next place, notwithstanding this presumption of innocence, it is equally true that a defendant is presumed to be sane and to have been

so at the time when the crime charged against him was committed—that is to say, the Government is not bound, as a part of its proofs, to show affirmatively that the defendant was sane. As insanity is the exception and most men are sane, the law presumes the latter condition of everybody until some reason is shown to believe the contrary. The burden is therefore on the defendant, who sets up insanity as an excuse for crime, to bring forward his proofs, in 'the first instance, to show that the presumption is a mistake so far as it relates to him.'" (Rec., p. 45.)

This assignment is based upon the following exception:

I read again from the celebrated Guiteau Case. The burden is on the defendant to bring forward his proof that he is insane. (Rec., p. 37.)

This court will not reverse because the trial judge read from the Guiteau Case. (*Pointer* v. *United States*, 151 U. S., 396, 416.)

The sixtieth assignment of error is as follows:

It was error for the court to refuse to charge the jury as follows, as asked by the defendant:

"If the jury have a reasonable doubt arising out of the evidence as to whether the defendant killed the deceased with malice aforethought, then he would not be guilty of murder, but of manslaughter, if the evidence satisfies them beyond a reasonable doubt that he was not insane at the time of the commission of the act; but if, from the evidence, they have a reasonable doubt as to whether he was of such soundness of memory and discretion as to have done the killing deliberately, maliciously, and premeditatedly, he can not be convicted of murder." (Rec., p. 54.)

The court in its charge fully stated the principle adopted by this court on the question of burden of proof on the defense of insanity and of reasonable doubt of the defendant's sanity. He instructed the jury as follows:

> "But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned, *i. e.*, that the defendant is innocent till he is proved guilty, and that he is and was sane, unless evidence to the contrary appears, and, considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground (either as to the killing or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal."

In this very case that doctrine was approved. The Supreme Court says that "the principle is correctly stated by Mr. Justice Cox, of the supreme court of the District of Columbia, as follows:

> "The crime, then, involves three elements, viz, the killing, malice, and a responsible mind in the murderer. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned—i. e., that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears—and considering the whole evidence in the case, still entertain what is called a reasonable doubt on any ground (either as to the killing or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal." (Rec., p. 21.)

Again:

> Now, after all the evidence is in, bearing in mind the fact that the defendant starts into the case with the presumption of innocence in his favor, and also the presumption that he is sane in his favor—I say after all the evidence is in, after you bear these presumptions I have named in mind—that is, that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears—considering the whole evidence in the case, you still entertain what is called a reasonable doubt, as I have defined it, on any ground, either as to the killing or the responsible condition of mind, whether he is guilty of the crime of murder as it has been explained and defined, then it would be your duty to acquit the defendant if that is the state of case. (Rec., p. 32.)

IX.

Twenty-fourth assignment.

The twenty-fourth assignment of error is as follows:

> It was error for the court to charge the jury as follows:
>
> "As I have already told you, the law presumes that every person who has arrived at the age of discretion is of sound mind, and that presumption continues until the contrary is shown by all the evidence in the case." (Rec., p. 46.)

The only exception upon which this assignment can be based is the one set out above under point VI.

This portion of the charge, which appears on page 23 of the record, must be taken in connection with the balance of the charge, and especially those portions above set out in respect of proof of insanity and reasonable doubt of the sanity of the defendant.

X.

Thirty-first, thirty-second, thirty-third, and thirty-fourth assignments.

The thirty-first assignment of error is as follows:

> It was error for the court to charge the jury as follows:
>
> "Listen to the answer made by the House of Lords in answer to a question addressed to them a good many years ago:
>
> "'Nearly forty years ago one McNaughten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the House of Lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have since been regarded as settling the law on this subject in England, and with some qualifications have been approved in the courts in this country. One of the questions was: "If a person under an insane delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with regard to which delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed in revenge for such supposed injury, he would be liable to punishment."'" (Rec., pp. 48, 49.)

This assignment is based upon the following exception:

> Excepts to extract read from House of Lords (growing out of MacNaughten's Case), answers to the question of delusion. (Rec., p. 37.)

The thirty-second assignment of error is as follows:

> It was error for the court to charge the jury as follows:
>
> "If under the influence of his delusion he supposes another man to be in the act of taking his life, and he kills the man as he would kill in self-defense, he would then act under an insane delusion. Where there was no foundation for that, where he kills him because of threats made, then there is not that state of case which would lead you to believe that at the time of the killing he was under the delusion that the man killed—in this case, the man Sol Blackwell—was in the act of taking his life, and that must exist to create a case which may be known as a case where he acts under an insane delusion, and he must kill upon that ground. To establish that, then, it must be shown that the cause of the killing was a conclusion in his mind that at the time he slew him that is, in this case, when the man was picking cotton in the field that Sol Blackwell was in the act of killing him when such was not the fact; that, then, would be an insane delusion. But if he killed Sol Blackwell while Blackwell was at work, because of threats made that had been made, you may take that condition into consideration as evidence of deliberation, as evidence of design, as evidence showing previous preparation, as evidence showing, under the circumstances of this case, lying in wait, showing the doing of an act systematically and with continuity of purpose, and it does not show that the defendant acted under the insane delusion that Blackwell was at the time trying to take his life." (Rec., p. 49.)

The thirty-third assignment is as follows:

> It was error for the court to charge the jury as follows:
>
> "If he killed because of threats, then there would not be anything to show that Blackwell, at the time of the killing, had an immediate design upon his life, or that he was in the act of doing anything of that kind, it would not show, in other words, that the killing was caused by the conception in the mind of the defendant that Blackwell was then and there in the act of taking his life, when such was not the fact." (Rec., p. 49.)

The thirty-second and thirty-third assignments are based upon the following exception:

> Excepts to all the court's instructions upon insane delusion, and to each and every sentence and paragraph of the court's charge upon insane delusion. (Rec., p. 38.)

The thirty-fourth assignment of error is as follows:

> It was error for the court to charge the jury as follows:
>
> "In this case, I repeat, it must have been a state of case where the defendant acted under the belief at the time he killed Blackwell that Blackwell was in the act of killing him, in the act of perpetrating upon him an act of deadly violence, or that he might do him some great bodily harm, then and there, and that he could not reasonably es[illegible] from such condition, that would be an insane [illegible]usion which would excuse." (Rec., p. 50.)

This assignment is based upon the following exception:

> In this case it must be that he was acting under the delusion that Blackwell was about to kill him, and that he could not escape from it. (Rec., p. 38.)

The charge set out in these assignments of error is sustained by the following authorities:

3 Rice on Evidence, p. 667.
Clark's Criminal Law, p. 54.
1 Wharton's Criminal Law, sec. 37, 38.
1 Bishop on Criminal Law, sec. 393.
Com. v. *Rogers*, 7 Met., 500 (opinion by Ch. J. Shaw).
People v. *Taylor*, 138 N. Y., 398, 406–7.
Boswell v. *State*, 63 Ala., 307.
State v. *Newherter*, 46 Ia., 88, 100–1.
Baldwin v. *State*, 12 Mo., 223, 232.
Thurman v. *State*, 32 Neb., 224, 227.
State v. *Lewis*, 20 Nev., 333, 362.

XI.

The forty-third and forty-fourth assignments relate to the refusal of the court to charge as requested upon reasonable doubt. The court charged fully and correctly upon this subject.

XII.

Assignments 45, 46, 47, and 52 are based on refusals of the court to charge on the question of reasonable doubt as to sanity. As shown above under Point VIII the charge was full and correct on this subject.

XIII.

Assignments 48, 49, 50, 51, 53, 54, 55, 56, 57, and 58 are for refusals by the court of requests to charge upon the law of insanity. The jury were fully and correctly charged upon that subject. (See Record, pp. 20 to 29.)

XIV.

Fifty-ninth assignment.

The fifty-ninth assignment of error is as follows:

> It was error for the court to refuse to instruct the jury upon the law of manslaughter, as asked by the defendant. (Rec., p. 54.)

There was no evidence in this case bearing upon the issue of manslaughter. Therefore, defendant's requests for instructions on that point were properly refused. (*Sparf* v. *United States*, 156 U. S., 51, 63; *Stevenson* v. *United States*, 162 U. S., 313, 315.)

J. M. DICKINSON,
Assistant Attorney-General.